

The Achievement of Constitutionalism in Asia: Moving Beyond “Constitutions without Constitutionalism”

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The phrase “constitutions without constitutionalism” has been used by various authors to describe the state of constitutional law in Africa, the Middle East and Latin America at various points in time.¹ For significant periods, the constitutional circumstances of many Asian countries may also be aptly summarised by “constitutions without constitutionalism”. Just as in the daily life of individuals, it is relatively easy to say something or make a promise, but more difficult to translate what is said or promised into action and reality, so in the political and legal life of nations, it is relatively easy to make a constitution, but more difficult to put it into practice, to implement it and be governed by it – which is what “constitutionalism” is about. There is therefore nothing surprising about the phenomenon or “syndrome” of “constitutions without constitutionalism”, particularly in developing countries to which Western ideas, theories and institutions of constitutionalism have been transplanted in the course of the last two centuries.

As it is by no means obvious or likely that a nation’s constitution will be successfully put into practice after it has been enacted, it is indeed right and appropriate to talk of constitutionalism as an “achievement”. After identifying what he calls the five “functional characteristics” of constitutionalism, Grimm suggests that “If all these elements are present, we speak of the *achievement* of constitutionalism.”² He elaborates:

“Constitutionalism – deserves to be called an achievement, because it rules out any absolute or arbitrary power of men over men. By submitting all government action to rules, it makes the use of public power predictable – It provides a consensual basis for persons and groups with different ideas and interests to resolve their disputes in a civilized manner. And it enables a peaceful transition of power to be made. Under favourable conditions it can even contribute to the integration of a

¹ See generally H.W.O. Okoth-Ogendo, “Constitutions without Constitutionalism: Reflections on an African political paradox” in Douglas Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993), p. 65; Atilio A. Borón, “Latin America: Constitutionalism and the political traditions of liberalism and socialism” in Greenberg et al. (eds.), *ibid.*, p. 339; Nathan J. Brown, *Constitutions in a Nonconstitutional World* (New York: State University of New York Press, 2002); Asem Khalil, “From constitutions to constitutionalism in Arab states: Beyond paradox to opportunity” (2010) 1(3) *Transnational Legal Theory* 421.

² Dieter Grimm, “Types of constitutions” in Michel Rosenfeld and András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), p. 98 at 104 (emphasis in original).

society. [C]onstitutionalism is not an ideal type in the Weberian sense that allows only an approximation, but can never be completely reached. It is a historical reality that was in principle already fully developed by the first constitutions in North America and France and fulfilled its promise in a number of countries that had adopted constitutions in this sense.³

Although Grimm notes that constitutionalism is more than a mere ideal type, and stresses that "Constitutions that show all the characteristics of achievement did exist in history and do exist today,"⁴ I believe it is fair to say that even in the early twenty-first century, constitutionalism is still a work in progress in many parts of the world, particularly in Asia, Africa and Latin America. Many Third World countries have still not grown out of the syndrome of "constitutions without constitutionalism"; the "achievement" of constitutionalism is yet to come. Just as Fuller speaks of the project of legality or Rule of Law as being governed by a "morality of aspiration,"⁵ which means whether the ideal of the Rule of Law is realised in a particular country or legal system is a matter of degree, and the practitioner of the morality of aspiration should try her best to achieve excellence in, or a higher degree of fulfilment of, this ideal, so this "morality of aspiration" is also applicable to the practice of constitutionalism. The achievement of constitutionalism in a particular nation-state (or in the international order, insofar as the idea of global or transnational constitutionalism is valid⁶) is also a matter of degree.

The present book project attempts to inquire into the state of constitutionalism in Asia in the early twenty-first century, or the extent or degree to which constitutionalism has been "achieved" in this part of the world at the present time. Although constitutionalism as a theory and practice of government and law first originated in Western Europe and North America, there is by now considerable evidence of its positive reception in and successful "transplant" to a significant number of Asian countries. As I wrote previously, "A macrohistorical perspective, covering developments in Asia since the late nineteenth century, suggests that constitutionalism has broadened and deepened its reach, significantly, over the course

³ Dieter Grimm, "The achievement of constitutionalism and its prospects in a changed world" in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism* (Oxford University Press, 2010), p. 3 at 10.

⁴ Grimm, "Types of constitutions" p. 105.

⁵ Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), p. 5. The morality of aspiration is concerned with the striving to achieve a particular good that can be realised in different degrees. The higher the degree to which the good is achieved, the more successful and excellent is the moral project concerned.

⁶ See, e.g., Nicholas Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press, 2007); Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (New York: Cambridge University Press, 2009); Ming-Sung Kuo, "The end of constitutionalism as we know it? Boundaries and the state of global constitutional (dis)ordering" (2010) 1 (3) *Transnational Legal Theory* 329.

of time.⁷ The experience of different Asian countries in this regard provides useful and fascinating case studies of what Grimm calls the 'achievement of constitutionalism'.

For example, post-War Japan and India are cases of stable and relatively successful practice of constitutionalism in Asia for more than half a century. South Korea and Taiwan, two of the 'Four Little Dragons' of East Asia, are cases of successful democratic transitions since the 1980s from authoritarian developmental states into liberal constitutional democracies, where democratic consolidation was still in progress in the early twenty-first century. The Philippines, Thailand, Cambodia and Indonesia, which have also undergone democratic transitions at various points in time since the 1980s, are developing countries in the process of building constitutional democracy of a higher quality. Constitutional courts now exist in Taiwan, South Korea, Thailand, Cambodia and Indonesia (as well as Mongolia which is not covered by this volume), and have achieved varying degrees of success.⁸ The cases of Singapore and Malaysia have posed the question of whether there exist peculiarly 'Asian' values that shape conceptions of human rights and constitutionalism in Asia.⁹ Nepal provides an example of a most recent and still ongoing enterprise of constitution-making in Asia. Myanmar provides an example of a most recent and still ongoing exercise in transition from military government to constitutional rule. In the People's Republic of China, Vietnam and North Korea, one-party states still exist that seem to contradict the trends of constitutionalisation, judicialisation and democratisation in their neighbours, though movements towards the Rule of Law and improved legal protection of rights have taken place in China and Vietnam.¹⁰ In China's Special Administrative Region of Hong Kong (as well as Macau, which is not covered by this volume), the constitutional experiment of 'One Country, Two Systems' has unfolded. These, then, are the Asian countries and jurisdictions discussed in this book.

This introductory chapter consists of two main parts. Part I attempts to develop a conceptual framework for the purpose of studying, analyzing and evaluating constitutional, political and legal developments in countries on their path towards the 'achievement of constitutionalism'. Part II discusses the experience of Asian countries and jurisdictions from a historical and comparative perspective, utilising the

⁷ Albert H.Y. Chen, 'Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations' (2010) 8 *International Journal of Constitutional Law* 849 at 884.

⁸ See, e.g., Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Björn Dressel (ed.), *The Judicialization of Politics in Asia* (London: Routledge, 2012).

⁹ See, e.g., Albert H.Y. Chen, 'Conclusion: Comparative reflections on human rights in Asia' in Randall Peerenboom et al. (eds.), *Human Rights in Asia* (London: Routledge, 2006), p. 487.

¹⁰ John Gillespie and Albert H.Y. Chen (eds.), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (London: Routledge, 2010).

conceptual apparatus developed in Part I.

I A conceptual framework for the study of the achievement of constitutionalism

The modern idea of a written "constitution" for a nation-state came to fruition in the late eighteenth century in the course of the American and French Revolutions, the English constitutional instruments promulgated during the revolutionary upheavals of the seventeenth century being precursors of the modern constitutions.¹¹ The very meaning of the word "constitution" was transformed. As Sartori points out, although this word has been used to translate the term *politeía* in Aristotle's works, *politeía* only conveys the idea of the way in which a polity is patterned,¹² while the modern meaning of the word "constitution" refers to "a frame of political society, *organized through and by the law*, for the purpose of restraining arbitrary power."¹³ In the pre-modern era the word "constitution" or its equivalent in other European languages was "a descriptive, not a prescriptive, term,"¹⁴ referring to "the situation of a country as determined by a number of factors such as its geography, its climate, its population, its laws etc., or the state of a country as determined by its basic legal structure."¹⁵ "[T]he ancient idea of the constitution expressed the health and strength of the nation."¹⁶

What is new and distinctive about the modern idea of a constitution is that it is conceived as a fundamental written law which simultaneously establishes the governmental system of a state and regulates the exercise of political power within the system. In other words, the constitution constitutes the state and its government. The government derives its legitimacy and authority from the constitution. But who makes the constitution? The answer provided by eighteenth century thinkers,¹⁷ influenced by the social contract philosophy of the seventeenth century and the Age of Enlightenment, is that it is "the people" — the people of the nation-state — who are the makers of the constitution, acting directly or through their representatives in a

¹¹ An example of such documents is the Instrument of Government (1654) promulgated under Cromwell's rule. See Grimm, "Types of constitutions" p. 101. Grimm also points out (at p. 101) that "After the Glorious Revolution in 1688, 'constitution' in the singular gained ground and meant the basic rules concerning the government." The constitutional documents of the British colonies in North America (including the colonial charters granted by the Crown and the Fundamental Orders of Connecticut (1639)) are also examples of the earliest constitutions: see Karl Loewenstein, *Political Power and the Governmental Process* (Chicago: University of Chicago Press, 1957), p. 132.

¹² Giovanni Sartori, "Constitutionalism: a preliminary discussion" (1962) 56 (4) *American Political Science Review* 853 at 860 (italics in original).

¹³ *Ibid.* (emphasis in original).

¹⁴ Grimm, "Types of constitutions" p. 100.

¹⁵ *Ibid.*

¹⁶ Martin Loughlin, "What is constitutionalism?" in Dobner and Loughlin (eds.), *Twilight of Constitutionalism*, p. 47 at 48.

¹⁷ The most important of whom include Thomas Paine and Emmanuel Joseph Sieyès.

constituent assembly. This is the theory of the constituent power, as distinguished from the government power which is constituted by the constitution. The exercise of the constituent power by the people is a manifestation of the sovereignty of the people, a fundamental concept that underlies most constitutions of modern times all over the world.

In terms of their substantive content, modern constitutions represent attempts by their draftsmen to design rationally a form of government that can best serve the objectives of the nation-state. As Loughlin puts it, their theorists "imagined a situation in which somehow the people would come together to reject their traditional constitutions, the products of "accident and force" and would deliberate and devise a new framework of government from "reflection and choice".¹⁸ Influenced by liberalism, social contract theory and Enlightenment thought, and determined to put an end to the absolutism of the post-feudal state of the early modern era, the draftsmen of the first modern constitutions devised schemes of government for the purpose of minimising the possibility of abuse of political power, tyranny or oppression, and maximizing the protection of political freedom and the individual's rights to life, liberty and property. Hence principles and institutions such as the Rule of Law, separation of powers, checks and balances, parliamentary elections and judicial independence were written into constitutions. Bills of rights¹⁹ were also promulgated to specify and catalogue citizens' rights and freedoms which governments must respect.

After the birth of the first modern constitutions in the USA and France, the practice of constitution-making quickly spread throughout Europe in the course of the nineteenth century, and then all over the world in the course of the twentieth century. In today's world, almost all countries (Britain being the most notable exception) have written constitutions. The possession of a constitution seems to have been accepted by all as a hallmark of the legitimacy of a nation-state and its regime for both domestic and external purposes. However, as Grimm has rightly pointed out, "once invented the constitution could be instrumentalized for purposes other than the original ones, adopted only in part or even as a mere form".²⁰ For political scientists and scholars of comparative constitutional law, therefore, the challenge is to understand and distinguish the different purposes or functions which constitutions have served,²¹ and the different kinds of constitutions or constitutionalism which have come into existence since the modern idea of the constitution was born in the late eighteenth

¹⁸ Loughlin, "What is constitutionalism?" p. 48.

¹⁹ Such as the French Declaration of the Rights of Man and the Citizen (1789) and the Bill of Rights inserted into the Constitution of the USA in 1791.

²⁰ Grimm, "Types of constitutions" p. 105.

²¹ See, e.g., the discussion of the functions of constitutions in Saunderson's chapter in this volume.

century.

At the outset, a distinction may be drawn between what I would call 'pristine' constitutions and 'secondary' constitutions. Constitutions and constitutional thought first originated in Western civilization, and were then transplanted to societies and cultures in other parts of the world such as the Middle East, Asia and Africa. Constitutions in Western states may therefore be called 'pristine' constitutions, and those in countries outside the orbit of the West called 'secondary' constitutions. Since constitutions and constitutional practices evolved endogenously in some Western states and were quickly adopted by neighbouring Western states with similar social structures, economic circumstances and culture, it may be assumed that constitutionalism in its original form was more compatible with Western culture and social conditions than those of civilisations and societies to which the practice of having constitutions was subsequently exported. 'Pristine' constitutions can therefore be expected to be more successful in practice than 'secondary' constitutions. This is borne out by the phenomenon of 'constitutions without constitutionalism' mentioned above in this chapter.

Unlike the earliest 'pristine' constitutions, the first constitutions adopted by regimes in the non-Western world were not enacted after a revolution in order to constitute a new state and a new political order, nor inspired by the liberal doctrine of the protection of individuals' rights against possible violations by the government. Instead, such 'secondary' constitutions were designed to bolster the legitimacy of regimes threatened by Western powers and to enhance the effectiveness of their rule, although they did have the effect of modifying the existing political structure by introducing Western-style institutions such as parliaments and elections. Brown coins the term 'politically enabling documents'²² to characterise such constitutions: instead of aiming at the limitation and control of government, they were promulgated by the existing regime to enable itself to be more legitimate and more effective, and thus more capable of survival when faced with domestic and external challenges. Examples include the Ottoman Empire's constitution of 1876, the Egyptian constitution of 1882, and the constitution promulgated by the Meiji Emperor of Japan in 1889. The Qing Empire in China also attempted to move towards a constitutional monarchy in the early twentieth century, but was overthrown by the 1911 Revolution before the constitutional reforms could materialise.

The Meiji Constitution was modelled on the Prussian Constitution of 1850.²³ Although the movement of constitution-making engulfed European states as well as

²² Nathan J. Brown, 'Regime reinventing themselves: Constitutional development in the Arab world' in Saïd Amir Arjomand (ed.), *Constitutionalism and Political Reconstruction* (Leiden: Brill, 2007), p. 47 at pp. 49, 67.

²³ Hiroshi Oda, *Japanese Law* (London: Butterworths, 1992), p. 28.

the newly independent states in Latin America -- in the nineteenth century, there was not yet a uniform practice of enshrining citizens' rights in constitutions, which were primarily documents defining the structure of government and the division of powers between various state organs. For example, neither the Bismarkian federal constitution of Germany enacted in 1871 nor the 1875 constitution of the Third Republic in France included a bill of rights.²⁴ And the achievement of constitutionalism in Europe in the nineteenth century suffered reversals and setbacks in the course of the twentieth century, with the Bolshevik Revolution in Russia in 1917 and the rise of Nazism and Fascism in Germany and Italy. Ultimately, the terror and atrocities of the Second World War prompted deeper reflections on constitutionalism, what it requires and how it can be sustained. As a result, what has been termed the 'post-War constitutional paradigm' came into existence,²⁵ in which respect for human dignity and equality came to be recognised as the core value of the modern constitutional state. This paradigm was exemplified by the German Basic Law of 1949, which affirms the inviolability of human dignity, declares the basic principles of the liberal democratic order and the basic rights of individuals, and establishes a Federal Constitutional Court exercising the power of judicial review as guardian of the constitution and the 'objective value order' affirmed by it.²⁶

The end of the Second World War and the decolonization of Asia and Africa that followed gave rise to many new states in the international community. The exercise of constitution-making proved to be extremely useful for the founders of the new states. Constitutions declare their newly acquired sovereignty and independence, and serve as a symbol of nationhood and the unity and collective identity of the people of the new state. This wave of constitution-making is an illustration of 'constitutional learning' at work.²⁷ The idea of a 'constitution', which indigenous leaders of the colonised peoples had learnt from the metropolitan powers, was now used to put an end to colonialism and to proclaim the independence, liberation and empowerment of a new political community, whose territorial boundaries were in many cases those carved out by the former colonial powers struggling against one another. But the widespread adoption of the 'Western' practice of constitution-making by newly independent states in Asia and Africa does not necessarily mean that the new constitutions were intended to serve the same functions and purposes as the 'pristine constitutions' (as defined above) or the contemporary 'post-War constitutional paradigm' (as defined above) in the Western world, such as the legal limitation of

²⁴ See the discussion in Loewenstein, *Political Power*, pp. 142-3.

²⁵ Lorraine E. Weinrib, 'The postwar paradigm and American exceptionalism' in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006), p. 84.

²⁶ See Weinrib, *ibid.*

²⁷ For constitutional learning theory, see David S. Law and Mila Versteeg, 'The evolution and ideology of global constitutionalism' (2011) 99 (5) *California Law Review* 1163 at 1173-1175.

state power, checks and balances among state organs, and the defence of citizens' rights against the state.

Consider, for example, the cases of the Middle East and Africa. In the Middle East, constitutions were made in the new states that were created, some after World War I and some after World War II. Their common features included strong executives, weak parliaments and weak courts.²⁸ Some introduced single-party systems.²⁹ As Brown observes: 'the constitutions of independence generally established some democratic and liberal forms of government while depriving them of any tools to operate effectively. Elections were mandated in presidential systems but voters presented with a single choice determined by a stacked parliament. In monarchical systems, the king retained tools that allowed him to override or ignore elected parliaments.'³⁰ Starting from the 1950s, another wave of constitution-making swept the Arab states in the Middle East as new revolutionary regimes opposed to Western liberal values (which were now associated with imperialism) gained power. New national charters and constitutions were introduced which embodied the new ideology of the states.³¹ 'Egypt led the way in this regard, issuing a 'National Charter' after embarking on an 'Arab socialist' path in 1962; this was followed by a provisional constitution two years later.'³² The anti-liberal-democratic orientation of Arab constitutional patterns was to be reversed in more recent times, particularly after the US-led invasion of Iraq and the 'Arab Spring' in Tunisia, Egypt, Libya and other parts of the Middle East.³³

In Sub-Saharan Africa, there was also a trend of reaction against Western-style liberal-democratic constitutions soon after independence. For example, Kwame Nkrumah, founding father of Ghana as sub-Saharan Africa's first independent state, criticised the independence constitutions 'usually modelled on those of the former colonial masters -- as being intended for 'the preservation of imperial interests in the newly emergent state.'³⁴ Other African leaders such as Tanzania's Julius Nyerere and Kenya's Jomo Kenyatta were also critics of Western constitutionalism.³⁵ Faced with

²⁸ Brown, 'Regime reinventing themselves', p. 53.

²⁹ Ibid.

³⁰ Brown, 'Regime reinventing themselves', p. 54.

³¹ Ibid., pp. 54-5.

³² Ibid.

³³ See, e.g., Adeed Dawisha, *The Second Arab Awakening* (New York: W.W. Norton, 2013). For constitutionalism in the Middle East, see also Chibli Mallat, 'On the specificity of Middle Eastern constitutionalism' (2006) 38 *Case Western Reserve Journal of International Law* 13; Raja Bahlul, 'Is constitutionalism compatible with Islam?' in Pietro Costa and Danilo Zolo (eds.), *The Rule of Law: History, Theory and Criticism* (Dordrecht: Springer, 2007), p. 515.

³⁴ H. Kwasi Prempeh, 'Africa's 'constitutionalism revival': False start or new dawn?' (2007) 5 *International Journal of Constitutional Law* 469 at 473.

³⁵ Ibid., at 481.

the twin challenges of nation building and socioeconomic development,³⁶ African governments rationalised authoritarianism or even explicit constitutional endorsement of a one-party state as a political system appropriate for the conditions of their countries; they also preferred socialism to capitalism.³⁷ Between 1960 and 1962 thirteen newly independent African states, beginning with Ghana, amended or replaced their independence constitutions.³⁸ It was only after three decades of failure in economic development that African countries turned again to liberal constitutional democracy. In the 1990s, as the 'third wave' of democratisation swept the globe, constitutional reforms were introduced in many African states to enable multi-party elections and constitutional transfers of political power to take place, and they have indeed taken place. Civil liberties have been expanded, and the courts have taken on a more active role in enforcing the rights provisions in the constitutional texts.³⁹

Given the diversity of constitutional trajectories and experience among countries in different parts of the world, the question arises as to how their constitutions and legal-political practices relating to constitutions may be studied, analysed and classified. In the following, I will attempt to outline a conceptual framework for doing so, drawing on the brief historical survey above and the classifications of constitutions developed by Loewenstein and Sartori.

Loewenstein develops a new approach to the classification of constitutions which he calls the 'ontological' classification.⁴⁰ The ontological approach, instead of analyzing substance and content, focuses on the concordance of the reality of the power process with the norms of the constitution.⁴¹ Loewenstein thus distinguishes between three types of constitutions: normative, nominal and semantic. Using a simile, he suggests that a normative constitution is like a suit that fits and that is actually worn; a nominal constitution is like a suit which for the time being, hangs in the closet, to be worn when the national body politic has grown into it; in the case of a semantic constitution, the suit is not an honest suit at all; it is merely a cloak or a fancy dress.⁴² The meaning of the classification may be further elaborated as follows.

In Loewenstein's view, a constitution is what power holders and power addressees make of it in practical application.⁴³ A normative constitution is a living

³⁶ Ibid., at 475.

³⁷ Ibid., at 475-477.

³⁸ Ibid., at 474.

³⁹ See generally Prempeh, 'Africa's constitutionalism revival'. See also Charles Manga Fombad, 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007.

⁴⁰ Loewenstein, *Political Power and the Governmental Process*, p. 147.

⁴¹ Ibid., pp. 147-148.

⁴² Ibid., pp. 148-150.

⁴³ Ibid., p. 148.

constitution, one that is real and effective, faithfully observed by all concerned, and actually governing the dynamics of the power process instead of being governed by it.⁴⁴ A nominal constitution is one that is not lived up to in practice,⁴⁵ because the existing socioeconomic conditions militate against its implementation, but the hope exists, supported by the will of power holders and power addressees, that sooner or later the reality of the power process will conform to the blueprint. The primary objective of the nominal constitution is educational, with the goal, in the near or distant future, of becoming fully normative.⁴⁶ The nominal constitution is said to have its natural habitat in states where western democratic constitutionalism has been implanted into a colonial or feudal-agrarian social order.⁴⁷ Loewenstein believes that "The novices in constitutional government in Asia and Africa will have to pass through an extended apprenticeship in the nominal constitution before they can graduate to constitutional normativism."⁴⁸

As regards the semantic constitution, Loewenstein defines it as one that is fully applied and activated, but its ontological reality is nothing but the formalization of the existing location of political power for the exclusive benefit of the actual power holders.⁴⁹ "Instead of serving for the limitation of political power, it has become the tool for the stabilization and perpetuation of the grip of the factual power holders on the community. The peaceful, non-revolutionary change in the location of political power is impossible."⁵⁰ Loewenstein considers the constitution of the Soviet Union to be an example of the semantic constitution.⁵¹

If we apply Loewenstein's classification, then the pristine constitutions that evolved endogenously in the Western world, and the constitutions of liberal democratic states in the world today, may be regarded as normative constitutions, while contemporary communist states' constitutions that explicitly affirm and justify the communist party's monopoly of power would fall into the category of semantic constitutions. Indeed, as Grimm points out, such "socialist constitutions", together with constitutions of theocratic regimes, stand apart from other constitutions in the contemporary world in the sense that their legitimating principle is a "supra-individual absolute truth" rather than based on values of individual autonomy, pluralism and consensus.⁵² In the socialist constitution, the communist party's opposition is legitimized by superior insight in the ultimate aim of history and the true

⁴⁴ Ibid., pp. 148-149.

⁴⁵ Ibid., p. 148.

⁴⁶ Ibid., p. 149.

⁴⁷ Ibid., p. 151.

⁴⁸ Ibid., pp. 151-152.

⁴⁹ Ibid., p. 149.

⁵⁰ Ibid., p. 150.

⁵¹ Ibid., p. 152.

⁵² Grimm, "Types of constitutions" p. 114.

interest of the people.⁵³ In practice the Communist Party is the sole authoritative interpreter of the Constitution and the laws. The Constitution rather assists the government in achieving the pre-existing purpose of political rule. The question is therefore whether it is justified to regard these constitutions as a type of constitutionalism. If the measure is what was called here the achievement of constitutionalism, all essential characteristics of constitutions are missing.⁵⁴

Lowenstein's concept of the nominal constitution is more problematic. The nominal constitution as understood by Lowenstein is not merely a constitution that is not fully implemented and effective (because of the existing socioeconomic condition—for example, lack of political education and training, absence of an independent middle class, and other factors—opposed to its implementation⁵⁵); it is one that has the hope of being effective at some future point in time.⁵⁶ What is the basis of this hope? Lowenstein seems to ground this hope in the will of power holders and power addressees⁵⁷ whom he describes as novices in constitutional government in Asia and Africa—going through an extended apprenticeship in the nominal constitution.⁵⁸ However, this seems to assume too much good will on the part of rulers of states with nominal constitutions. History shows that many of these rulers were simply interested in maintaining their power and perpetuating their rule, just as in the case of rulers under Lowenstein's semantic constitutions. And many of these rulers (of states with nominal constitutions) did not themselves share Lowenstein's belief that it would be in the interest of the people of the states under their rule to practise Western-style liberal democracy in accordance with a normative constitution, because, for example, they believed that authoritarian rule would better facilitate economic development, or that the indigenous culture and values are such that Western-style liberal democracy would be counter-productive in terms of political stability and social order.

Bearing in mind these problems in Lowenstein's classification, we now turn to examine Sartori's classification of constitutions. Although Sartori wrote that he agreed very much (in substance, even though not in terminology) with⁵⁹ Lowenstein's scheme, his own threefold classification consists of the *garantiste* constitution (constitution, proper), the nominal constitution, and the façade

⁵³ Ibid., p. 128.

⁵⁴ Ibid., p. 129.

⁵⁵ Lowenstein, *Political Power*, p. 149. Lowenstein also points out (at p. 148) that a constitution requires a national climate conducive to its realization. The tradition of autocratic processes must have sufficiently atrophied in the minds of governors and governed to give constitutional government a reasonably fair chance.

⁵⁶ Ibid., p. 149.

⁵⁷ Ibid., p. 149.

⁵⁸ Ibid., pp. 151-152.

⁵⁹ Sartori, "Constitutionalism: a preliminary discussion" at 861.

constitution (or fake constitution)ö. Sartori's *garantiste* constitutionö is equivalent to Loewenstein's normative constitution; such a constitution fulfils what Sartori considers to be öthe purpose, the *telos*, of English, American and European constitutionalismö, which öcould be expressed and synthesized by just one word: the French (and Italian) term *garantisme*ö.⁶⁰ ö[A]ll over the Western area people requested, or cherished, öthe constitution,ö because this term meant to them a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a ölimited government.ö⁶¹ As regards Sartori's önominal constitutionö, he acknowledges that this refers to öthe constitutions that Loewenstein labels ösemanticö (a difficult, and perhaps not quite appropriate labeling).ö⁶² They are öcollection[s] of rules which organize but do not restrain the exercise of political power in a given polity. í They frankly describe a system of limitless, unchecked power. They are not a dead letter. It is only that this letter is irrelevant to the *telos* of constitutionalism.ö⁶³

What is most significant for our present purposes is Sartori's concept of the öfaçade constitution (or fake constitution)ö. Façade constitutions ötake the appearance of ötrue constitutionsö but öare disregarded (at least in their essential *garantiste* features). Actually they are ötrap-constitutions.ö As far as the techniques of liberty and the rights of the power addressees are concerned, they are a dead letterö.⁶⁴ As mentioned above, Loewenstein has suggested that the objective of what he calls a önominal constitutionö is öeducational, with the goal í of becoming fully normative.ö⁶⁵ In discussing the öfaçade constitutionö, Sartori expressly rejects the view that the façade constitution or öfake constitution has an educational *purpose*. It *may* turn out that it has an educational *effect*. But this is a very different matter. We are not historians dealing with past events and looking for their *a posteriori* justification.ö⁶⁶

For Sartori, the main difference between what he calls önominal constitutionsö and öfaçade constitutionsö is that whereas the former öactually describe the working of the political systemö (though öthey do not abide by the *telos* of constitutionalismö) and are in this sense ösincere reportsö, the latter ögive us no reliable information about the real governmental processö and are öbasically a disguise.ö⁶⁷ However, Sartori also recognizes that ö[t]here is often a considerable overlapping between nominal and

⁶⁰ Ibid. at 855.

⁶¹ Ibid. at 855.

⁶² Ibid. at 861.

⁶³ Ibid. at 861.

⁶⁴ Ibid. at 861.

⁶⁵ Loewenstein, *Political Power*, p. 149.

⁶⁶ Sartori, öConstitutionalismö at 861 (emphasis in original).

⁶⁷ Ibid. at 861.

façade constitutions, and there exists a mixed type (partly nominal and partly fake) of pseudo-constitution.⁶⁸

A comparison between Loewenstein's nominal constitution and Sartori's façade constitution may be useful at this point. Both constitutions consist of texts which are consistent with the normative project of constitutionalism. They are therefore likely to be liberal-democratic in orientation, providing for what Sartori calls the techniques of liberty such as separation of powers, checks and balances, protection of human rights, periodic elections to parliaments and top governmental offices, peaceful transfer of power in accordance with electoral outcomes, the Rule of Law and judicial independence. And both are constitutions which are not fully put into practice in the countries to which they are legally applicable.

Examples of such non-implementation of the constitution might include: the government and its bureaucracy is weak and has no capacity to enforce the law across the country; the rights recognised in the constitution are not realised in any meaningful way and are worth no more than paper; constitutional institutions such as legislatures and courts are weak and are not able to exercise their constitutionally prescribed powers and functions in a practically significant or effective manner; there is no independent media, middle class or active civil society to monitor and promote the implementation of the constitution; political parties are weak and ineffective, and fail to operate constitutional mechanisms or processes available to them under the constitution; extra-constitutional forces such as the military do not abide by the constitution and may resort to coups; the existing powerholders have no commitment to the constitution and manipulate constitutional norms, institutions and processes for the purpose of staying in power, by, for example, rigging elections, buying votes, illegitimately controlling who may be candidates in elections, violating constitutional rights and human rights, using the law in a discriminatory manner to persecute political opponents, or otherwise denying political opponents a fair opportunity to compete for power on a level playing field in accordance with constitutional norms.

It may be noted that some of the above examples (particularly those attributable to the incongruence between the actual sociopolitical conditions and environment of the country concerned and its constitutional norms) correspond to what Loewenstein says about nominal constitutions, while others (particularly those attributable to the lack of intention or will on the part of the powerholders to observe and implement the constitution faithfully) relate to what Sartori says about façade constitutions. Indeed, the key difference between Loewenstein's nominal constitutions and Sartori's façade constitutions appears to lie in the reasons why constitutional norms are not translated into reality. In Sartori's case, the powerholders do not take them seriously;

⁶⁸ Ibid. at 861.

hence the term 'fake constitutions'. In Loewenstein's case, the powerholders are making a genuine attempt to implement the constitution, though implementation is difficult because of the country's socioeconomic conditions and political reality. Hence Loewenstein believes that there is still 'hope'.

I have in my previous works⁶⁹ proposed a threefold classification of constitutionalism or of political, constitutional and legal practices relating to constitutions: 'constitutionalism in its classical sense' (or 'genuine constitutionalism', abbreviated as GC); 'Leninist-Stalinist forms of rule by a communist party-state legitimized by a written constitution defining the structure of the state and declaring the rights of citizens'⁷⁰ or 'communist/socialist constitutionalism' (abbreviated CC) (though it is doubtful whether this is a genuine form of constitutionalism); and 'hybrid constitutionalism' (abbreviated HC) or 'hybrid constitutional practices' (which is a concept analogous to that of 'hybrid regimes' as theorised by political scientists⁷¹), 'practised in states in which both elements of liberal constitutionalism and authoritarian elements that subvert or are inconsistent with such constitutionalism exist'.⁷² This scheme of classification may be mapped onto Loewenstein's and Sartori's schemes as follows. GC corresponds to Loewenstein's 'normative constitution' or Sartori's 'garantiste constitution'. CC would be based on what Loewenstein calls a 'semantic constitution' or what Sartori calls a 'nominal constitution'. And HC would embrace Loewenstein's 'nominal constitutions', Sartori's 'façade constitutions' and Sartori's 'mixed type of pseudo-constitution'.

This threefold classification of GC, CC and HC may provide the point of departure for a comparative study of political, legal and judicial practices relating to constitutions in different parts of the world. Such a comparative study should include a study of both the 'statics' and 'dynamics' of constitutions and constitutionalism. 'Dynamics' here refers to constitutional change, development or evolution, including both progress and regression or degeneration -- notions which presuppose that GC (as compared to HC or CC) is the highest level of constitutionalism, corresponding to what Grimm calls the 'achievement of constitutionalism', and the fullest realisation of what Fuller calls the 'morality of aspiration' as applied to the domain of politics and public law.

The dynamics of constitutional development in a particular country's history may be such that it moves from HC to GC (as the East Asian cases of South Korea, Taiwan

⁶⁹ Chen, 'Pathways of Western liberal constitutional development in Asia' at 880; Albert H.Y. Chen, 'Constitutionalism and constitutional change in East and Southeast Asia: A historical and comparative overview' in Albert H.Y. Chen and Tom Ginsburg (eds.), *Public Law in East Asia* (Ashgate, 2013), p. xv (Introduction) at xvi-xvii.

⁷⁰ Chen, 'Pathways' at 880.

⁷¹ See Larry Diamond, 'Thinking about hybrid regimes' (2002) 13(2) *Journal of Democracy* 21.

⁷² Chen, 'Constitutionalism and constitutional change', p. xvii.

and Indonesia have exemplified), or from CC to GC (as demonstrated in Eastern Europe in the 1990s). Lowenstein himself has contemplated the movement of Asian and African countries from "nominal constitutions" to "normative constitutions", as well as the "gradual transition" in communist states "from a strictly semantic to a nominal or even a normative constitution".⁷³ More recently, scholars of Asian constitutional change have written about "transitional constitutionalism" (in countries such as South Korea and Taiwan which have undergone a transition from authoritarianism to democracy)⁷⁴ and the idea of a "constitutional tipping point" (as applied to Southeast Asian countries), defined as "the point in the development of a constitutional order at which the political struggle for constitutionalism rapidly gives way to an entrenched constitutional culture and the constitution takes on a normative life of its own".⁷⁵

In the contemporary world, GC is basically co-extensive with the political system of liberal democratic states in the West and in non-Western states which have successfully evolved into liberal democracy. The equivalence of GC with liberal democracy was not always the case in history, as the "achievement of constitutionalism" in Western states such as Britain, France and the USA *preceded* their democratisation to become states which practised universal and equal suffrage for all citizens. Nevertheless, in the early twenty-first century world, GC is indeed almost synonymous with liberal democracy. Furthermore, if we turn to the dynamics of constitutional development in the contemporary world, a transition from CC or HC to GC is in practice the same process as the transition of the country concerned from communist party rule or other forms of authoritarian, pseudo-democratic or semi-democratic governance into liberal democracy. The question therefore arises as regards what exactly is the province of the study of constitutionalism as compared to the study of liberal democracy and of democratisation in the contemporary world.

The answer to this question would appear to lie in the distinction between the overlapping, but by no means identical, concepts of constitutionalism and democracy themselves. Democracy is about the self-government and self-determination of the people ó people who consider themselves members of the same nation-state. It is also about electoral and voting systems that resolve differences of opinion by giving effect the will of the majority. Constitutionalism, on the hand, is concerned with what

⁷³ Loewenstein, *Political Power*, pp. 151-153.

⁷⁴ Jiunn-Rong Yeh and Wen-Chen Chang, "The changing landscape of modern constitutionalism: Transitional perspective" (2009) 4(1) *National Taiwan University Law Review* 145. See also these two scholars' co-authored article on comparative constitutional law in Taiwan, South Korea and Japan, "The Emergence of East Asian Constitutionalism: Features in Comparison" (2011) 59 *American Journal of Comparative Law* 805.

⁷⁵ Victor V. Ramraj, "Constitutional tipping points: Sustainable constitutionalism in theory and practice" (2010) 1(2) *Transnational Legal Theory* 191 at 192.

Sartori calls the design and operation of those 'techniques of liberty' that are put into and used by the constitution for the purposes of constraining, controlling and regulating the exercise of political power by government, preventing power from being arbitrary or absolute, and safeguarding those fundamental rights and freedoms that derive from the human being's personhood and human dignity. Constitutionalism is therefore concerned with matters such as separation of powers, checks and balances, legislative oversight of the executive, the Rule of Law, judicial independence, constitutional judicial review and human rights. Constitutionalism also provides the legal foundation for the operation of democracy, by stipulating electoral rules, protecting political rights to free speech, assembly and association, and regulating power transfer or succession of top powerholders.

The study of constitutionalism in a particular country should therefore include matters such as the following: activities of constitution-making and constitutional amendment; constitutional litigation, the interpretation of the constitution by courts (or the constitutional court if such a court exists) and their exercise of the power of review of legislation or governmental actions (this subject is sometimes called 'legal' or 'judicial' constitutionalism⁷⁶); the making of major laws relating to the implementation of the constitution; the exercise of powers by the legislature, particularly how it scrutinises the work of the government and ensures the accountability of the government (the operation of the legislature and the exercise of its constitutional functions are of particular interest from the perspective of 'political constitutionalism'⁷⁷); the use of the constitution and the institutions and processes established by it in the resolution of major conflicts between opposing political forces and in ensuring peaceful transfer or succession of power; public discourse, political activism and social struggles in the community which draw on the concepts, principles and rights enshrined in the constitution or any part of its text as resources to be used (these may be said to fall within the concept of 'social constitutionalism'⁷⁸). The degree of activities or activism in the above domains ('degree of constitutional activism', abbreviated as DCA) would indicate to what extent the constitution is really 'normative' (in Lowenstein's sense), to what extent GC exists in the country concerned, to what extent there has been the 'achievement of constitutionalism', or to what extent there has been a movement from HC or CC to GC.

The above discussion supplies a basic conceptual framework which may be used for the study of constitutional and related political and legal phenomena in the Asian

⁷⁶ See generally Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), pp. 1-12; Ramraj, 'Constitutional tipping points' at 193-195.

⁷⁷ See Bellamy, *ibid.*, Ramraj, *ibid.* at 195-197.

⁷⁸ Ramraj, 'Constitutional tipping points' at 197-199. Ramj, also Dowdle and Balme

countries covered by this book. In the next part of this chapter, I shall attempt to provide an overview and general review of such Asian experience of constitutions and constitutionalism from a historical and comparative perspective, using the concepts of GC, CC, HC and DCA introduced above.

II The achievement of constitutionalism in Asia

This book consists of country-based reviews of constitutional developments in sixteen Asian countries or jurisdictions, focusing in particular on developments since the beginning of the twenty-first century, together with three chapters (including the present chapter 1) which consider Asian constitutional trends more generally. The country studies include all countries or jurisdictions in East Asia (Japan, North and South Korea, the P.R.C., Taiwan, Hong Kong), most of the countries in Southeast Asia (Vietnam, Cambodia, Thailand, Myanmar, Malaysia, Singapore, the Philippines and Indonesia), and two selected case studies from South Asia (India and Nepal). There is great ethnic, linguistic, religious and cultural diversity among these Asian societies. What they share in common is that they have all experienced, either directly or indirectly, Western imperialism and colonialism in their modern history, which have had a significant impact on their constitutional and political developments.

Southeast Asia (with the exception of Thailand) and India were colonised by Western powers and only became independent nation-states after World War II. Japan and China did not come under Western rule, but experienced respectively the Meiji reform and the 1911 revolution which initiated their modern constitutional trajectories. Taiwan and Korea came under Japanese rule at the end of the nineteenth century and at the beginning of the twentieth century respectively, which came to an end only after World War II. It appears that the geographical location and size of Asian countries has been a relevant factor affecting their political fates in modern times. The following discussion of Asian constitutional experience and pathways of development will therefore be organised geographically, starting with East Asia, then turning to mainland Southeast Asia, and then maritime Southeast Asia, and finally to South Asia. Actually, the order in which chapters in this book on the relevant countries and jurisdictions appear also follows these geographic divisions.

Japan. Japan was the first Asian country to embark upon the project of constitutionalisation after it came into contact with the West. The political configuration of the feudal society under the Tokugawa shogunate was transformed by the Meiji Restoration of 1868, which established a strong and centralized system of government under the Meiji Emperor. The principal objective of the Meiji reform was to build a rich country and a strong military that could stand up to the Western

challenge. In response to an indigenous movement for constitutional reform, the Meiji Constitution was promulgated by the Emperor in 1889. The Japanese experience from the 1890s until the rise of a military government in the 1930s that practised a high degree of authoritarianism may be described as hybrid constitutionalism (HC). The constitution vested sovereignty in the Emperor instead of the people, but a parliament (the Imperial Diet) was established including a lower house which by 1925 was elected by universal manhood suffrage with competition among different political parties. A British-style practice of parliamentary government became to evolve. The constitution declared the rights and duties of subjects, though in practice civil and political rights were tightly restricted by law. The constitution did not require ministers appointed by the Emperor to be responsible to parliament. The Emperor and not the civilian government enjoyed the constitutional authority to command the military.

After World War II, the Meiji Constitution was amended to become a new constitution which affirms the sovereignty of the people (with the Emperor becoming a symbolic head of state), parliamentary government, human rights and judicial review. The distinctive feature of this 1946 Constitution is its article 9, the *ōpacifismō* provision on the renunciation of war. With no single amendment since its enactment, this constitution is now one of the oldest surviving constitutions in the contemporary world. And it has been fully put into practice, providing a paradigmatic example of a country progressing from HC (under the Meiji Constitution, moving however to a completely *ōfake constitutionō* in Sartori's sense in the 1930s) to GC, though doubt has been expressed as regards whether Japan would have achieved this transition *ōwithout the shock of losing the Pacific War and without massive Occupation support for Japan's liberal forces.⁷⁹* Sakaguchi's chapter in this volume discusses various attempts and proposals to amend the constitution, particularly article 9, partly motivated by the Liberal Democratic Party's view that it was imposed on Japan while it was still under American occupation immediately after the War. In my view, these attempts demonstrate that the constitution has indeed been taken seriously in Japan. Sakaguchi also illustrates the roles of the Cabinet Legislation Bureau (which he describes as a quasi-constitutional court) and the Supreme Court in interpreting the Japanese constitution. It seems that there is at least a moderate degree of constitutional activism (DCA) in contemporary Japan.

Korea. In Korea, once a tributary state of China's, the Chosen dynasty (1392-1910) came to an end with the Japanese annexation of Korea after Japan's victories in its wars with China (1895) and Russia (1905). The Korean people

⁷⁹ Lawrence W. Beer, *Human Rights Constitutionalism in Japan and Asia* (Folkestone: Global Oriental, 2009), p. 168.

experienced colonial Japanese rule of a highly authoritarian nature until the end of World War II, when Korea became divided into the Republic of Korea in the South and the Democratic People's Republic of Korea in the North. North Korea has been under one-man rule through a communist party – the Korean Workers' Party – up to this day. Although the constitution is basically Stalinist in style and orientation, the legitimacy of the regime under Kim Jong-il and now Kim Jong-un is largely based on 'dynastic succession' to Kim Il-sung, the founder of the regime. North Korea's constitution and its various amendments exemplify what Lowenstein calls the 'semantic constitution', because they do provide information about the formal structure of the North Korean state and its ideology. Yoon's chapter in this volume shows how successive changes to this constitution reveal the ideological evolution of the regime (such as the gradual de-emphasis on Marxism-Leninism and communism and the introduction of the indigenous ideology of Juche (self-reliance) and subsequently of Songun (military first), shifts in economic policy (from strict communism to a certain degree of openness to foreign investment), and modifications of the governmental structure (such as the increasing concentration of political power in the National Defence Commission and its chairman).

In contrast with the apparent political stability (at the cost of totalitarian repression) and 'dynastic' continuity of North Korea, South Korea, which adopted a liberal democratic constitution in 1948, experienced four tumultuous decades and nine major constitutional revisions in its history, the last of which resulting in the 1987 Constitution of the 'Sixth Republic' which is currently in force. The varying patterns of constitutional and political practices in these four decades may be said to fall under the rubric of HC, with different mixes of democracy, constitutionalism and authoritarianism at different points in time. South Korea did experience rapid economic development under the strongman rule of President Park Chung-hee (1961-1979), who steered Korea's rise as one of the 'Four Little Dragons' of East Asia. In 1972, he proclaimed martial law and pushed through the Yushin Constitution, described by critics as 'a constitution which legalized authoritarian rule',⁸⁰ inaugurating a 'dark age' for constitutionalism in South Korea.⁸¹ Political instability engulfed South Korea after Park was assassinated in 1979, leading to the infamous Kwangju massacre of 1980. Fierce struggles by activists and civil society for democratisation finally won concessions from the military-led regime, resulting in the liberal democratic constitution of 1987 which introduced direct popular election of the president (in lieu of election by an electoral college) and established a new

⁸⁰ Jürgen Kleiner, *Korea: A Century of Change* (River Edge, NJ: World Scientific, 2001), p. 156.

⁸¹ Tscholsu Kim and Sang Don Lee, 'The influence of U.S. constitutional law doctrines in Korea', in Lawrence W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle: University of Washington Press, 1992), p. 303 at 318.

constitutional court. Kim's chapter in this volume provides ample evidence of the high DCA in South Korea today, including the debate on constitutional revision, and the emergence of the constitutional court as a key player in what Kim calls 'omega-politics'. The chapter clearly shows that the process of democratic consolidation is alive and well in this new stronghold of GC in Asia.

China (including Hong Kong and Taiwan). Compared to its neighbours Japan and South Korea, China (particularly mainland China after the establishment of the People's Republic of China (PRC)) has lagged behind in the achievement of constitutionalism. The PRC still practices CC today, although GC has now emerged in the Special Administrative Region of Hong Kong and on the island of Taiwan.

During the last decade of its dynastic rule in China, the Qing court began to move towards a constitutional monarchy. An 'Imperial Constitutional Outline' was promulgated in 1908, and provincial assemblies were elected. The 1911 Revolution overthrew the Qing Empire, and the Republic of China (RoC) was established in 1912 with a liberal democratic provisional constitution. In the first one and a half decade of the republican era, several constitutions were promulgated or drafted by successive governments in Beijing, but none was effective as China was beset with warlordism and civil strife. In 1928, the Kuomintang (KMT, or Chinese Nationalist Party) under Chiang Kai-shek's leadership succeeded to unify large parts of China (but not areas under the control of the Chinese Communist Party (CCP)) and established a new RoC government in Nanjing. The KMT adhered to the strategy of constitutional development advocated by its founder, Dr Sun Yat-sen, which involved a three-stage process of military government, political tutelage (under one-party rule in preparation for the third stage), and constitutional government. Using our terminology, this may be understood as a theory about establishing HC first and then moving towards GC. A provisional constitution for the period of political tutelage was promulgated in 1931 which expressly vested power in the KMT. After the end of the Sino-Japanese War in 1945, a new Constitution of the RoC, containing all key ingredients of a liberal constitutional democracy and establishing a constitutional court (consisting of the Grand Justices of the Judicial Yuan), was adopted by a constituent assembly in 1946.

This new constitution was not accepted by the CCP, and a civil war between the CCP and the KMT raged for several years, ending in the KMT's defeat and the retreat of the RoC government to Taiwan, which had been ceded by the Qing Empire to Japan in 1895 and liberated from Japanese rule in 1945. During the civil war, the KMT regime introduced a constitutional amendment known as the 'Temporary Provisions for the Period of National Mobilisation to Suppress the Communist Rebellion', which expanded the emergency powers of the president. Martial law was decreed by the KMT government, first in the mainland and then in Taiwan. The civil

liberties and democratic elections promised by the 1946 Constitution were suspended by the RoC regime in Taiwan for nearly four decades, during which Taiwan under the strongman rule of Chiang Kai-shek and then his son Chiang Ching-kuo underwent rapid economic development and rose to become another of the 'Four Little Dragons' of East Asia, together with South Korea, Hong Kong and Singapore. In this period, the constitutional court was operational, though not in such a manner as to challenge the government on politically sensitive matters. As time progressed, there was a considerable degree of social and even political pluralism, and elections took place at the municipal and county levels, as well as elections to a minority of seats in the Legislative Yuan. The constitutional and political practices of this period may be understood as falling within our concept of HC.

Taiwan's transition from HC to GC began with the lifting of the martial law decree by President Chiang Ching-kuo in 1987. In the late 1980s and the early 1990s, Taiwan underwent rapid liberalisation and democratisation. The Temporary Provisions were repealed in 1991. Seven exercises of constitutional revision in 1991-2005 substantially changed the nature and structure of the RoC state. A 'silent revolution'⁸² was achieved in Taiwan. Multiparty elections were periodically held, leading to changes in government and transfers of power between political parties (the KMT and the Democratic Progressive Party (DPP)) in 2000 and 2008. Since the late 1980s, the constitutional court played an active role in declaring as unconstitutional the laws and regulations of the previous authoritarian regime. The constitutional amendment of 1999 was even declared unconstitutional and invalid by the constitutional court,⁸³ invoking the jurisprudence that certain fundamental principles of the liberal democratic constitutional order ought to be protected against amendment or violation. As the chapter by Yeh and Chang in this volume demonstrates, in the first decade of this century, the constitutional court has played a more crucial role than ever before in adjudicating political conflicts arising from the circumstances of a 'divided government' in which the presidency and government on the one hand and the Legislative Yuan on the other hand were controlled by different political parties (the DPP and the KMT respectively). The chapter also shows the high DCA in Taiwan, which, as in the case of South Korea, testifies to the vibrancy of the process of democratic consolidation.

On the Chinese mainland, the first constitution of the PRC was enacted in 1954, largely modelled on the Stalinist constitution in 1936. China under Mao Zedong pursued a more 'leftist' path than the USSR itself. The second constitution of the PRC -- the 1975 Constitution -- codified the ideology of the Cultural Revolution era.

⁸² Lee Teng-hui, *Taiwan de zhuzhang (The Views of Taiwan)* (Taipei: Yuanliu, 1999), pp. 162-163 (in Chinese).

⁸³ Interpretation No. 499 (March 2000). See generally www.judicial.gov.tw/constitutionalcourt.

The 1978 Constitution marked the beginning of the retreat from Maoism, while the 1982 Constitution laid the institutional and legal foundations for Deng Xiaoping's era of reform and opening. This fourth constitution of the PRC is still in force today, subject to four sets of amendment introduced between 1988 and 2004. The amendments reflect the changing ideology and priorities of the CCP, which, despite radical changes in its policies of economic and social development, has continued to defend at all costs its monopoly of political power. The details of the 2004 amendment are discussed in the chapter by Wang and Tu in this volume, which also covers other major legislative initiatives in the domain of Chinese constitutional law in the first decade of this century, and landmark events such as the *Qi Yuling* case and the Sun Zhigang incident. It is noteworthy that, as evidenced by the repeal in 2008 of the Supreme People's Court's landmark interpretation in 2001 in the *Qi Yuling* case, the regime has made it clear that Chinese courts have no role to play in interpreting and enforcing the Constitution. However, the Sun Zhigang incident of 2003 and subsequent developments in *weiquan* (rights defence) movements in Chinese civil society suggest that the concepts, principles and rights enshrined in the Chinese constitution have been increasingly used by litigants, activists and aggrieved persons to fight for justice and for the protection of their constitutional rights against violations by authorities. It may be said that there is a moderate DCA in China today.

The practice of 'One Country, Two Systems' (OCTS) with regard to the autonomous Special Administrative Regions of Hong Kong and Macau, established in 1997 and 1999 respectively after the termination of British and Portuguese colonial rule, is an interesting feature of the existing constitutional order of the PRC. Constitutional developments relating to OCTS are briefly touched upon in the chapter by Wang and Tu in this volume, and discussed in greater detail in Chan's chapter. In my assessment, although Hong Kong has not yet achieved full democratisation in the sense of the election of its Chief Executive and of all members of its Legislative Council by universal suffrage, its constitutional and political practices in the post-handover period may be considered as GC at work, with elements such as the Rule of Law, judicial independence, civil liberties, separation of powers, political checks and balances, as well as a free press and a vibrant civil society. In the first decade of this century, the struggles for the further democratisation of Hong Kong have brought about a high DCA in Hong Kong. It is to the PRC's credit that even though its own constitution is one of CC, it has enacted and adhered to a Basic Law (of the Hong Kong Special Administrative Region) that has sustained GC in Hong Kong, the foundation of which was laid during the period of transition in 1984-1997 (1984 being the year when the Sino-British Joint Declaration on Hong Kong's future was signed), when Hong Kong underwent a transition from HC (that was typical of

the authoritarian mode of British colonial rule in Asia and Africa) to GC.

Vietnam. Traditional imperial rule in Vietnam, which had been influenced by Chinese Confucian civilisation, disintegrated as French colonisation proceeded in the second half of the nineteenth century. Vietnam became part of French Indo-China, until it came under Japanese occupation during the Pacific War. After the war, the Vietnamese fought for independence from France. The French were defeated; the Geneva Agreement of 1954 recognised Vietnamese independence and partitioned it between North and South. War raged for many years between the two regimes, culminating in massive US intervention in the 1960s. In South Vietnam, the 1956 and 1967 constitutions were liberal democratic in their texts. North Vietnam became communist, as clearly evidenced by its 1959 constitution which replaced the more liberal 1946 constitution. After South Vietnam was conquered by the North in 1975, a new constitution was adopted in 1980, which established CC in the newly unified state. As in the case of post-Mao China, Vietnam also embarked on the path of economic reform and liberalisation from totalitarianism when its communist party announced the *doi moi* (renovation) policy in 1986. The new constitution enacted in 1992 affirms both human rights and property rights. In a manner reminiscent of the Chinese constitutional amendment of 1999, the 2001 constitutional amendment in Vietnam declares that Vietnam is a law-governed socialist state. Bui's chapter in this volume provides an overview of constitutional developments in Vietnam since the beginning of this century, including the latest proposals for constitutional amendment which are expected to be adopted before the end of 2013. The chapter shows, for example, that despite the maintenance of one-party rule in contemporary Vietnam, more room has now been allowed for electoral competition among candidates for the National Assembly; the National Assembly has become more assertive in exercising its constitutional powers; constitutional provisions have been invoked in public discourse to challenge government policies or decisions; the communist party itself has recognised the legitimacy of concepts such as the limitation and control of state power. There appears therefore to be at least a moderate DCA in Vietnam. Whether the latest exercise of constitutional amendment will result in the creation of a constitutional court or a quasi-constitutional court remains to be seen. The case of Vietnam demonstrates that CC is capable of significant self-reform, possibly inaugurating a transition at least to HC, even if GC is still too remote to be contemplated.

Cambodia. As recounted in Tan's chapter in this volume, Cambodia became a French protectorate in 1863 with its traditional monarchy being preserved. Prince Norodom Sihanouk ascended the throne in 1941 with French support. After World War II, the French organised an election for a constituent assembly in 1946, which

adopted a constitution in 1947 modelled on that of the French Fourth Republic, though Cambodia was a monarchy under this constitution. Cambodia was granted full independence in 1953. Sihanouk ruled as a strongman in an authoritarian manner until he was ousted by a coup in 1970. Nine constitutional amendments were made before 1970. In 1975, the Khmer Rouge came to power. An estimated one million people died during the communist reign of terror, which only ended with the Vietnamese invasion in 1979. With Vietnamese support, Hun Sen practiced strongman rule, with a communist constitution modelled on those of the USSR and Vietnam (or what we call CC). A civil war raged for years between Hun Sen's government and a coalition of resistance forces including the Khmer Rouge and Royalists supporting Sihanouk. Internationally brokered ceasefire came with the Paris Peace Accord of 1991. The UN Transitional Authority in Cambodia oversaw the election of a new national assembly in 1993, which adopted a new constitution drafted in accordance with liberal democratic guidelines laid down by the Paris Agreement -- re-establishing Cambodia as a constitutional monarchy. Since 1993, regular elections with multiparty competition have taken place, several constitutional amendments have been introduced, and a constitutional council was established in 1998 which has since exercised the power of constitutional review. Yet Hun Sen has survived the constitutional changes and continued to rule as strongman. Cambodia can probably be said to be in a state of HC.

Thailand. Thailand's constitutional story is also told in Tan's chapter in this volume. Thailand is the only nation in Southeast Asia which has not been colonised by Western powers. Its constitutional practice, which began with the establishment of a constitutional monarchy in 1932, is therefore an entirely indigenous enterprise. Thai constitutional history is characterised by frequent oscillations between military and civilian rule, with recurring cycles of constitution-making, general election, formation of and rule by a constitutional civilian government, and then military coup. Seventeen constitutions, some provisional and some intended to be more permanent, have come and gone. There existed critical moments of popular protests changing the course of Thai political history, such as the students' revolution of 1973, and the popular protests in Bangkok in 1992 which led to bloodshed and intervention by the highly respected King Bhumibol. As Tan points out in his chapter, the 1997 Constitution was hailed as Thailand's most liberal and democratic constitution, and a 'people's constitution' enacted only after extensive public consultation. It established a constitutional court, which subsequently played a crucial role in Thai politics. Yet the great promises of this constitution were dashed when a military coup in 2006 toppled Prime Minister Thaksin Shinawatra. Although the military returned power to a civilian government elected under the new 2007 Constitution (which replaced the

interim constitution of 2006) that was approved by the people in a referendum, the political situation soon deteriorated with the continuous and violent confrontation between the anti-Thaksin "Yellow Shirts" and the pro-Thaksin "Red Shirts". Political instability continued after the 2011 election by which Yingluck Shinawatra came to power, and she was eventually overthrown by a coup in 2014. Whether Thailand will finally grow out of its own brand of HC in which constitutional continuity is prone to be broken by coups remains to be seen.

Myanmar (Burma). The Burmese kingdom was one of the most powerful states in Southeast Asia at the end of the eighteenth century, but weakened relative to the Thai and Vietnamese kingdoms in the nineteenth century. In 1886 Burma came under British rule. It became part of British India, but was constituted a separate colony in the 1930s, with a new colonial constitution enacted in 1935. As pointed out in Tan's chapter in this volume, the British allowed the Burmese to practise parliamentary cabinet government in the 1930s. After the War, a constituent assembly was elected in which the Anti-Fascist People's Freedom League, formed during the war with Japan and led by Aung San, won the majority of seats. A constitution was adopted in 1947, providing for a British-style parliamentary system and federalism, and Burma was granted independence in 1948. But as pointed out by Tan, Burma was beset by ethnic strife, secessionist movements, and civil war, and its civil service was weak. The experiments in parliamentary democracy finally came to an end with the military coup of 1962. The 1947 Constitution was set aside, and the military government ruled by decree for 12 years until a new "socialist" constitution for one-party rule was adopted in 1974. In 1988, popular demonstrations for democracy were suppressed and another military coup occurred. The new government set aside the 1974 Constitution, and held an election in 1990. Although the National League for Democracy led by Aung San Suu Kyi won a landslide victory, the government refused to hand over power and maintained authoritarian rule without even a "fake constitution" (in Sartori's sense) for two decades. Finally, in 2008, a new constitution of the Republic of the Union of Myanmar – the drafting of which actually started in 1993 -- was enacted and approved by a referendum, allowing multiparty elections but reserving a quarter of the seats in each house of parliament for the military. There have been signs of political liberalization more recently, with the release of Aung San Suu Kyi from house arrest in 2010, and she and her party securing parliamentary seats in the 2012 by-elections. Thus Myanmar has moved from a state without even a "nominal" or "semantic" constitution (in Loewenstein's sense) to the beginnings of HC.

Malaysia. Like Burma, Malaysia also formed part of the British Empire in Asia, but its constitutional path after independence was much more stable and relatively successful. Shortly before Malaya acquired independence in 1957, a general election

was held in 1955 at which the Alliance led by the United Malays National Organisation (UMNO) first came to power. Malaya's independence constitution was drafted by a commission led by Lord Reid from Britain, and provided for a British-style parliamentary system, a federal structure and a constitutional monarchy. In 1963, the Federation of Malaysia was formed by the addition of three new states to the Federation of Malaya. (One of them, Singapore, was ejected from the federation in 1965.) The Alliance, subsequently known as Barisan Nasional (BN), has been continuously in power since independence through victories in parliamentary elections, although, as emphasised by Lee in his chapter in this volume, the opposition made considerable gains in the 2008 election which led to BN losing the two-thirds parliamentary majority that is required for any constitutional amendment. Since the independence constitution was made, fifty amendments have been introduced, the trend of which was to concentrate more power on the executive. A watershed event in Malaysian history was the 1969 racial riots which led to a declaration of emergency and curtailment of civil liberties. Under the leadership of Dr Mahathir Mohamad, who served as prime minister for successive terms in 1981-2003, Malaysia made good progress in economic development, but judicial independence suffered a severe blow in 1988 when the Lord President and two other Supreme Court judges were removed. Lee in his chapter points out that even today, public confidence in the judiciary has not been completely restored. He also discusses the politics of democratisation and Islamisation, and the role of the hereditary Malay rulers. There seems to be at least a moderate DCA in Malaysia. Constitutional and political practices in Malaysia may be classified as constituting HC or as being very close to GC, depending on how much weight one attaches to civil liberties, judicial independence and transfer of power as an electoral outcome.

Singapore. There are considerable similarities between the constitutional trajectories of Malaysia and Singapore; the latter's constitutional practices have been described by Thio as 'communitarian constitutionalism'⁸⁴ or 'illiberal constitutionalism'.⁸⁵ When Malaya became independent in 1957, Singapore was still a British colony. As in Malaya, elections had already been held in Singapore before it acquired independence. In the 1959 election, the People's Action Party (PAP) led by Lee Kuan Yew came to power. As mentioned above, Singapore joined the new Federation of Malaysia in 1963, but became independent in 1965. Singapore's constitution was in many ways similar to Malaysia's, adopting the British parliamentary system and inheriting the English common law, but Singapore is a republic. The PAP has been continuously in power since independence through

⁸⁴ See Thio's chapter in this volume.

⁸⁵ Li-ann Thio, 'Constitutionalism in illiberal polities' in Rosenfeld and Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, p. 133.

victories in periodic elections, always (since 1968) controlling more than the two-thirds parliamentary majority required for constitutional amendment, nearly forty of which have been introduced as the government thought fit. Opposition candidates did compete in elections. As pointed out in Thio's chapter in this volume, a significant development in the 2011 election was that an opposition party won a multi-member constituency for the first time. In that election, the PAP won 60% of the votes; thus a significant number of voters voted for non-PAP candidates. Thio also discusses the constitutional innovations introduced by the PAP regime over the years, including the creation of a popularly elected presidency, independent of the executive and exercising financial powers, and the introduction of nominated (non-popularly elected) members and non-constituency members of parliament (the latter being candidates from the opposition who failed to get elected). Thio points out that the Singapore courts prefer communitarian values (including the social goals of political stability, inter-racial harmony, and economic development) to Western concepts of the individual's rights, and are relatively more conservative or deferential to the government than their Malaysian counterparts in the exercise of their powers of review of governmental actions and in interpreting rights provisions in the constitution. As in the case of Malaysia, I consider the case of Singapore to be one of HC or very close to GC, depending on how much weight we attach in our assessment to civil liberties, judicial activism and transfer of power as an electoral outcome.

The Philippines. Whereas the constitutional foundation for Malaysia and Singapore was laid by the British, American influence was predominant in the case of the Philippines. Spanish colonisation of the Philippines began in the late sixteenth century. During the Spanish-American War, the Filipinos declared independence in 1898 and proclaimed the establishment of the first republic in Asia. However, the Philippines came under U.S. rule in 1901. U.S. policy was to prepare the Philippines for independence as a liberal democratic state. A constitution modelled on the U.S. Constitution was enacted in 1935 for the Philippines Commonwealth as a territory which enjoyed autonomy under American sovereignty. The Philippines was taken over by the Japanese during the Pacific War. In 1946, it acquired independence with an American-style political system based on the 1935 constitution which remained in force. A 25-year experiment in liberal democracy came to an end in 1972 when Marcos (president since 1966) declared martial law. In 1973, a new constitution was enacted to replace the 1935 constitution. Marcos's authoritarian rule came to an end in the peaceful "People Power" revolution of 1986 which followed the presidential election in which Corazon Aquino, widow of the assassinated opposition politician Benigno Aquino, ran against Marcos. A new 1987 Constitution with strong liberal democratic features was enacted under Corazon Aquino's presidency. Since then,

although periodic elections were held, political stability was occasionally threatened by popular unrests, attempted coups and secessionist struggles in the south. In 2001, President Estrada was ousted by another "People Power" protest, which led to the assumption of the presidency by Arroyo, then Vice-President. As discussed in Pangalangan's chapter in this volume, Arroyo's presidency (2001-2010) faced various challenges, including a legal challenge to the validity of her assumption of power, allegations of rigging of the 2004 election, impeachment attempts by Congress, and attempted coups. Pangalangan points out that Arroyo resorted to emergency powers four times, often in such a manner as to evade the checks-and-balances provided for in the constitution. The Supreme Court has been called upon to adjudicate various politically controversial issues, and has invalidated some of the impugned governmental actions. Pangalangan's chapter shows that there is a high DCA in the Philippines, with political actors making use of constitutional and legal rules and institutions in their struggles against one another. It is at least a case of HC, and may be regarded as approximating GC except that the record of "People Power" revolutions and attempted coups would militate against GC.

Indonesia. Like the Philippines, Indonesia also experienced authoritarian strongman rule preceded and followed by attempts to practise liberal democracy, except that the period of strongman rule in Indonesia was much longer. Dutch colonisation of what is today Indonesia began in the mid eighteenth century. After the Pacific War, the indigenous Indonesians fought against the Dutch for independence. The Dutch were defeated and at the Hague Conference of 1949, the independence of Indonesia as a republic was recognised. Earlier, in 1945, an independence constitution had been promulgated, which expressed Soekarno's "Pancasila" ideology and was also based on Soepomo's concept of the integralist or organic state (as opposed to individualism and liberalism). The new 1950 Constitution established a parliamentary system, and the first general election was held in 1955 in which 16 political parties secured parliamentary seats. However, Soekarno declared martial law in 1957 and restored the 1945 Constitution. His authoritarian rule continued until 1965, when a coup occurred during which an estimated half a million people were massacred in an anti-communist drive. General Soeharto came to power and established a "New Order" regime with guaranteed participation of the military in the political system (*dwifungsi*). As pointed out by Hosen in his chapter in this volume, in the New Order regime only three political parties were allowed to participate in elections which were generally stage-managed. Soeharto's rule finally came to an end in 1998 when Indonesia was badly hurt by the Asian financial crisis and there was civil unrest. Civil liberties were restored, and in 1999 the first free election since 1955 was held in which 48 political parties participated. As discussed by Hosen in his chapter, the newly elected national

assembly enacted a series of constitutional amendments in 1999-2002 which transformed Indonesia into a liberal democratic constitutional state. Since then, direct presidential elections have been successfully held in 2004 and 2009, with the 2004 election resulting in a peaceful transfer of power (to Yudhoyono as president). The Constitutional Court established in 2003 has built up a reasonably good record in reviewing and invalidating laws and in adjudicating election disputes. Human rights protection has been strengthened, and, as pointed out by Hosen, civil and political rights in Indonesia have been highly evaluated by Freedom House relative to other Southeast Asian countries. Indonesia as the most populous Muslim state in the contemporary world is now also one of the world's most populous democracies. Hosen observes that key political actors in Indonesia are committed to resolving their disputes non-violently through constitutional processes; Indonesia may be able to provide a model for other countries of the reconciliation of Islam with constitutional democracy. Thus Indonesia seems to be an important and revealing case of transition from HC to GC in Asia, though with only two recent presidential elections by universal suffrage on the record, whether democratic consolidation has occurred is yet to be observed.

India. The Mogul Empire was in existence in India when the English East India Company began its activities in India in the seventeenth century. In 1858, the British Raj in India was established as the British government assumed full responsibility for the governance of India and Parliament enacted the Government of India Act 1858. The last constitutional document enacted by the British Parliament for India before its independence was the Government of India Act 1935. Before independence, elections to the Indian legislature had already been introduced, and political parties such as the Indian National Congress and the Muslim League had already been in existence. In 1947 the British Parliament enacted the Indian Independence Act, providing for the creation of India and Pakistan, each having its own constituent assembly for making its constitution. In 1949, the Constitution of India was adopted. This lengthy 395-article constitution inherited much of the content of the Government of India Act 1935, and exhibited all the features of liberal constitutional democracy. India was given a federal structure and a parliamentary system of government at both the Union and state levels.

The Indian constitution has undergone approximately a hundred amendments, some of which were introduced to override decisions of the Supreme Court which has been activist in exercising the power of constitutional review and has even developed a doctrine that it is beyond the competence of Parliament (acting by a two-thirds majority of each of its two houses) to amend constitutional provisions that pertain to its "basic structure". As pointed out by Deva in his chapter in this volume, the

colonial experience has led to the internalisation by the Indian political elite of elements of the British constitutional tradition, and the constitutional norms of liberal democracy have been largely adhered to except for a short period in the mid 1970s (when prime minister Indira Gandhi proclaimed a state of emergency). Deva discusses particularly the activism of the Indian Supreme Court in what he calls 'constitutional engagement at a micro level'. He explains that the dysfunctional response of the executive and the legislature in handling problems such as 'governance gaps' and environmental pollution has created an opportunity for the judiciary to play a 'hyper-active' role in such matters, but he also doubts whether the courts have the capacity to tackle these problems effectively. Overall speaking, the Indian judiciary is apparently not known for its effectiveness, as demonstrated by long delays in the judicial process and occasional corruption scandals. Nevertheless, given that India is a developing country with much poverty, huge social and economic inequalities, and tensions between groups divided along ethnic, religious and caste lines, its achievement in constitutionalism is indeed significant and may be regarded as a case of GC with a high DCA.

Nepal. Last but not least, we turn to the case of Nepal, which, as demonstrated in Ghai's chapter, is an interesting case of constitution-making during the first decade of the twenty-first century. The territory of what is today Nepal was first unified in 1768, inaugurating the Shah dynasty of kings which continued until Nepal became a republic in 2008. In the period 1864-1951, the Shah monarchs were no more than figureheads, and Nepal was ruled by the Rana dynasty which practised hereditary succession to the position of prime minister, the real powerholder. The first constitution in Nepali history was promulgated in 1948. Autocratic rule by the Rana family came to an end in 1951 with the restoration of power to the Shah monarch, King Tribhuwan, who ruled with the assistance of the developing political parties. In 1959, under the reign of King Mahendra, a constitution based on the British parliamentary model was promulgated, pursuant to which the first multiparty election in Nepali history was held in 1960. However, conflict between the monarchy and parliamentary leaders soon led to the dissolution of parliament and absolutist rule by King Mahendra, who legitimised his rule by the 1962 Constitution, which established the 'Panchayat' (council) system in which multiparty electoral competition was not allowed. In 1972 King Birendra ascended the throne. He maintained the Panchayat system which survived the referendum of 1980. However, in 1990 a popular revolt known as the 'People's Movement' (*Jana Andolan*) forced the king to give up the Panchayat system and to turn Nepal into a constitutional monarchy with multiparty parliamentary democracy. A new liberal democratic constitution was enacted in 1990, pursuant to which the general election of 1991 was held. Nevertheless, the practice of

parliamentary government failed to stabilise because one of the political parties, the Communist Party of Nepal (Maoist), began an armed rebellion against the government in 1996. The civil war only came to an end in 2006 with the signing of a Comprehensive Peace Accord, as discussed in Ghai's chapter in this volume. Ghai also discusses the enactment of the interim constitution of 2007, the parliament's decision in 2007 to abolish the monarchy, the election in 2008 of a constituent assembly to draft a new constitution, the difficult issues faced by the constitution makers, and the failure to agree on a new constitution by the deadline stipulated in the interim constitution. At the time of writing, another election was about to be held for a new constituent assembly to continue the task of constitution-making. It may therefore be seen that Nepal is still in an early stage of constitutional development. It has evolved a kind of HC which however had been threatened by a decade-long civil war. Apparently there now exists a commitment on the part of the political elite to move towards GC in future, and there has been a high DCA in recent years because of constitution-making activities.

Conclusion. As Saunders points out in her chapter in this volume, although the existing literature on legal transplant focuses largely on private law, the development of constitutions and constitutional law in non-Western parts of the world such as Asia has also been a process of legal transplant, and thus faces the common problems and challenges faced by all legal transplants, in addition to those peculiar to the project of constitutionalism. Given the inherent difficulties of transposing a Western plant to Asian soil, the phenomenon or syndrome mentioned at the beginning of this chapter of "constitutions without constitutionalism" is by no means surprising. As mentioned earlier in this chapter, the "achievement of constitutionalism" or the practice of "genuine constitutionalism" (GC) is a matter of degree, governed by what Fuller calls the morality of aspiration. The brief survey above in this chapter and the remainder of this book tell this story of the achievement of constitutionalism in Asia up to this day.

Using the classification of GC, CC and HC developed in this chapter, the overall situation in the countries or jurisdictions studied in this book may be summarised as follows. In modern times, Western constitutional ideas and practices were introduced into Asia either by colonisation or as Asian civilisations came under the challenge of imperialism. Before World War II, forms of HC had begun to develop in Japan and China. After World War II, GC was soon established in Japan and newly independent India. Mainland China, North Korea and Vietnam came under the influence of CC. As Ginsburg implies in his chapter in this volume, the legal reforms and constitutional discourses in contemporary China and Vietnam demonstrate that their constitutions are by no means merely a "fake constitution" or "nominal constitution" (in Sartori's classification). This suggests that the concept of CC may not be completely

satisfactory and adequate (insofar as it fails to distinguish between the case of North Korea on the one hand and those of China and Vietnam on the other hand), and elements of HC may also evolve within CC.

HC is a broad concept which may be applied to most of the other countries covered by this book at various points in time. HC was practised in South Korea and Taiwan, both of which underwent a successful transition to GC since the second half of the 1980s. Malaysia and Singapore trod a stable and steady path of constitutional development since independence which I would describe as HC or close to GC, depending on how much weight we attach to civil liberties. Other Southeast Asian countries experienced varying degrees of instability in the course of their constitutional development. Among them, Indonesia may be regarded as a case of transition from HC to GC since the turn of the century. The Philippines since the democratisation of the 1980s is a case of HC approximating GC. HC in Thailand has been characterised by cycles of military coups and rule by democratically elected civilian politicians. The potential for GC under the current constitution exists. HC in Cambodia is conditioned by Hun Sen's strongman rule. Myanmar has experienced significant periods of military rule without even a constitutional document, but is now moving in the direction of HC. Nepal, which has seen political instability and civil war in recent times but is now in the process of making a new constitution, may be classified as a case of HC with aspirations towards GC.

Overall speaking, the achievement of constitutionalism in Asia since the end of World War II, and particularly since the 1980s, has been considerable and significant. Although some scholars associate the Western form of liberal constitutional democracy with imperialism and global capitalism,⁸⁶ the historical evidence is that constitutionalism has appealed to Asian peoples in their struggles for emancipation and justice, and has also been embraced by the political elite in many Asian countries as a political order that is both morally legitimate and practically appropriate for local conditions. If progress is at all possible in human history, then the achievement of constitutionalism in the governance of human societies may be regarded as a significant element and sign of such progress. This book is a testimony to such progress in the context of Asian societies in search of a legitimate and viable means of their own governance. It shows that constitutionalism is still very much a work in progress in many parts of Asia, a goal, an ideal and an aspiration for and towards which many people, famous or anonymous, high or low, are working, toiling struggling or suffering. The "end of history"⁸⁷ is not yet in sight.

⁸⁶ See, e.g., James Tully, "The imperialism of modern constitutional democracy" in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), p. 315.

⁸⁷ Francis Fukuyama, *The End of History and the Last Man* (New York: The Free Press, 1992).