Asian Journal of Comparative Law (2021), **16**, 285–310
doi:10.1017/asjcl.2021.23

ASIAN JOURNAL OF COMPARATIVE LAW
CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Varieties of Constitutionalism in Asia

Thio Li-ann

National University of Singapore Faculty of Law
Corresponding author. E-mail: lawtla@nus.edu.sg

(Received 16 February 2021; revised 9 May 2021; accepted 13 June 2021; first published online 6 October 2021)

Abstract

Western liberal constitutionalism, the dominant vision of which is rights-oriented and court centric is hegemonic to the discourse. While important, this is a particular rather than total expression of constitutionalism which conflates constitutionalism with liberalism and treat this as paradigmatic. This may obscure all other non-liberal models or fuel their dismissal as sham constitutions. A third space must be found, without collapsing anti-constitutionalist, illiberal despotism with no objective limits on power into the sphere of constitutionalism, and without equating judicial review with constitutionalism. To that end, this article seeks to advance the project of pluralising understandings of constitutionalism, drawing from the rich variety of constitutional experiments in Asia, with its multiplicity of religions, political ideologies government systems, cultures, and levels of economic development. Against an idealised model of liberal constitutionalism deployed as an organisational tool to highlight features of non-liberal constitutionalism in their full variety, the article examines three typologies of constitutionalism: religious, socialist and communitarian. In so doing, the idea of normatively desirable and defensible constitutionalist models is investigated, through an inquiry that goes beyond text and courts to other sites of constitutional practice and governance.

Introduction

Studying the varieties of constitutionalisms in Asia advances the project of pluralising understandings of constitutionalism, which relates to the approximate 'achievement'[1] of limited government by legal and political constraints; these limits are set out in written, supreme constitutions and developed by constitutional practice, amendment and interpretation. While all countries have a 'constitution', understood as a term *descriptive* of the framework of a government system, 'constitutionalism' is *prescriptive* and connotes a desirable state of affairs and the methods to attain this.[2] Generic constitutionalism regulates public power and secures a polity's fundamental values, which informs its character, limiting and legitimating government.

This project tempers the ethnocentric parochialism of focusing on the Western liberal democratic model of constitutionalism ('WLC') which is hegemonic to the discourse. Whittington notes that constitutionalism has 'often been associated specifically with liberalism, with the protection of individual rights against the state.'[3] The dominant vision of WLC is a rights-oriented court-

[1]Dieter Grimm, 'Types of Constitutions', in Michel Rosenfeld & Andras Sajo (eds), *Oxford Handbook on Comparative Constitutional Law* (Oxford University Press 2012) 105.

[2]For Louis Henkin's seven criteria, flowing form liberal democratic commitments, to what constitutionalism demands, see Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' (1992) 14 Cardozo Law Review 533, 535–536. On German constitutionalism as the core of European constitutionalism, see Klaus Stern *Das Staatsrecht der Bundesrepublik Deutschland* [*The State Law of Germany*], vol 1 (2nd edn, CH Beck 1984) 769, summarised by Francois Venter, 'South Africa; A Diceyan Rechtsstaat?' (2012) 57 McGill Law Journal 721, 726–727.

[3]Keith E Whittington, 'Constitutionalism', in Keith E Whittington, R Daniel Kelemen & Gregory A Caldeira (eds), *Oxford Handbook in Law and Politics* (Oxford University Press 2008) 281.

centric model, where the 'liberalism of fear',[4] fuels the imperative of constructing schemes to restrain both absolutist rulers and rules, and to protect the rights of atomic individuals against the leviathan state. This is a particular, not a total, expression of constitutionalism, though some conflate 'liberalism' with 'constitutionalism' and treat WLC as paradigmatic, against which all other constitutional orders are evaluated. This may cause the occultation of all other 'non-liberal' models[5] or their dismissal as sham constitutions.[6] The WLC model has been criticised both in normative terms and for failing to capture the lived reality of constitutional experience, which is spiced by variety and not uniformity.[7] There are other ways of limiting political power besides rights and judicial enforcement, such as power-sharing mechanisms based on the separation of powers, federalism, devolution, and non-judicial supervisory agencies. Constitutionalism is about fettered power, not individual rights per se. Power can be regulated by restraint and positive direction to secure objectives consonant with the fundamental values and identity that frame the normative architecture of a constitutional order. For example, 'global south' constitutionalism[8], which 'connotes a sensibility to questions of marginalisation and exclusion'[9] seeks to channel state power towards poverty eradication by empowering state organs to run development programmes. Relational constitutionalism focuses on how institutions promote dialogue and interaction to foster communal bonds and public goods like racial and religious harmony within plural societies.[10]

The term 'constitutionalism' historically was 'invented in the late eighteenth or early nineteenth century to refer chiefly to the American doctrine of the supremacy of the written constitution over enacted laws'.[11] However, we live today in a world of multiple constitutional models where all manner of adjectives are appended to describe the character and function of constitutions,[12] and the misuse of constitutions.[13] There is no singular WLC model, reflected in the particularities of British, American and German constitutionalism models,[14] and comparative constitutional law in Asia has attracted considerable scholarly attention.[15]

While a spectrum of constitutional models has been identified, these are hierarchically ordered, as exemplified by Loewenstein's distinction between normative, nominal and semantic constitutions. Loewenstein argued that 'novices in constitutional government in Asia and Africa' would require an 'extended apprenticeship' in nominal constitutions before graduating to 'constitutional normativism'.[16] Chen also identifies as 'pristine' liberal democratic constitutions which alone display 'full' constitutionalism, compared to 'secondary' models such as hybrid regimes displaying liberal and authoritarian elements, or socialist constitutions based on the rule of a single communist

[4]Judith Shklar, *Political Thought and Political Thinkers* (Stanley Hoffman ed, University of Chicago Press 1998) 3.

[5]Li-ann Thio, 'Constitutionalism in Illiberal Polities', in Michel Rosenfeld & Andras Sajo (eds), *Oxford Handbook on Comparative Constitutional Law* (Oxford University Press 2012) 133–152.

[6]Michael Dowdle & Michael Wilkinson (eds), *Constitutionalism beyond Liberalism* (Cambridge University Press 2017) 17.

[7]Graham Walker, 'The Idea of Nonliberal Constitutionalism', in Ian Shapiro & William Kymlicka (eds), *Ethnicity and Group Rights* (New York University Press 1997) 154–184.

[8]Zoran Oklopcic, 'The South of Western constitutionalism: a map ahead of a journey' (2016) 37 Third World Quarterly 2080–2097.

[9]Philipp Dann, 'The Global South in Comparative Constitutional Law' (Verfassungsblog, 14 Jul 2017) <https://verfassungsblog.de/the-global-south-in-comparative-constitutional-law/> accessed 11 Aug 2021.

[10]Li-ann Thio, 'Relational Constitutionalism and the Management of Inter-Religious Disputes: The Singapore "Secularism with a Soul" Model' (2012) 2 Oxford Journal of Law and Religion 446.

[11]Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) 395–396.

[12]Mark Tushnet, 'Editorial' (2016) 14 International Journal of Constitutional Law 1.

[13]David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189.

[14]James T McHugh, *Comparative Constitutional Traditions* (Peter Lang Inc 2002).

[15]See eg, Wen-Chen Chang et al, *Constitutionalism in Asia* (Hart Publishing 2014); Rosalind Dixon & Tom Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar 2012).

[16]Karl Loewenstein, *Political Power and the Government Process* (University of Chicago Press 1957) 151–152.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

party with a written constitution formally setting out the powers of state organs.[17] Tushnet distinguishes between authoritarian and absolutist constitutionalisms, with liberal constitutionalism at the apex of normative desirability.[18]

The underlying fear motivating these schemes appears to be that of validating 'sham' constitutions that are anti-constitutionalist (being centred around the rule of one man or elite group); such constitutions are complicit in perpetuating rather than curbing tyrannical rule, under which law facilitates governance rather than restrains government. This fear is legitimate, and it is accepted that constitutions which merely organise a totalitarian regime, such as the Constitution of the Democratic People's Republic of Korea (DPRK), do not sustain constitutionalism.[19] This DPRK Constitution, which embodies the *juche* (self-reliance) ideology as blueprint for a 'socialist fatherland', establishes the cult of Kim Il Sung as the 'great leader' who is 'the sun of the nation' and the 'eternal President of the Republic'; the Constitution confides the task of realising the autarkic *juche* revolution, which priorities the state above all else, under the Worker's Party of Korea's leadership, excluding all foreign influence. Similar to the Fuhrer doctrine, Kim Il Sung enjoyed absolute authority and state organs were committed to realising the will of their Leader, whose power stemmed from 'charismatic authority',[20] not the defined terms of public office. The Leader has god-like status as the 'impeccable brain of the living body,' the party its 'nerve center', and the masses 'can be endowed with their life in exchange for their loyalty to him.'[21] This ideology then justified the passage of hereditary dictatorship to Kim Jong Il and later to Kim Jong Un.

Between WLC and totalitarian systems like that in North Korea, a range of non-liberal constitutions exist. Certainly, some Asian countries are inspired by WLC models and aspire to their attainment, treating the WLC like a latter-day 'standard of civilisation'; indeed, the Japanese Meiji Constitution of 1889, Asia's first written constitution, was an effort to modernise and earn Western respect, while preserving Japanese independence. Scholars have referred to the pre-socialist era in countries like China and Vietnam where liberal constitutional values were influential, and how these have been resurrected in discussions about constitutional revisions in the twenty-first century; this reflects 'restoration constitutionalism,' a desire to return to some approximation of liberal constitutionalism.[22] Other scholars seek to demonstrate how constitutionalist values are not foreign but can be located in pre-modern cultural norms that, as functional analogues, disciplined rulers through political norms and practices.[23] While, in framing pre-existing or post-revolutionary political power, constitutionalism has been described as the 'gift of Europe (including Britain) and the United States to the world of the 21st Century, emanating from the political, economic and constitutional history of what is often referred to as "the West",'[24] it has clearly received wide support as a standard for assessing good government. Whether Asian constitutions embraced

[17]Albert HY Chen, 'The achievement of constitutionalism in Asia: moving beyond 'constitutions without constitutionalism', in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press 2014) 6.

[18]Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 Cornell Law Review 391, 396.

[19]Dae-kyu Yoon, 'Constitutional Change in North Korea', in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press 2014) 101–117.

[20]Max Weber, Economic and Society: An outline of Interpretive Sociology (Guenther Roth & Claus Wittich eds, University of California Press 1978) 216.

[21]Ken Gause, 'The Roles and Influence of the Party Apparatus', in Kyung-Ae Park & Scott Synder (eds), *North Korea in Transition: Politics, Economy and Society* (Rowman & Littlefields Publishers 2012) 22. See also Grace Lee, 'The Political Philosophy of Juche' (2003) 3 Stanford Journal of East Asian Affairs 105.

[22]Bui Ngoc Son, 'Restoration Constitutionalism and Socialist Asia' (2015) 37 Loyola of Los Angeles International and Comparative Law Review 67.

[23]Chaihark Hahm, 'Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?' (2001) 1 Journal of Korean Law 151.

[24]Francois Venter, *Constitutionalism and Religion* (Edward Elgar 2015) 50.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

values first developed in the West or sought to indigenise constitutional thought and culture, the North Korea constitution and its despotic political order remains the anti-model.

This article does not attempt a comprehensive typology of constitutionalisms in Asia; it seeks to provide a provisional orientation to guide those wanting to navigate the diverse terrain of constitutionalism within Asia, with its multiplicity of religions, political ideologies (socialism, communitarianism, democracy), government systems (whether presidential, parliamentarian, hybrids, even absolute monarchies like Brunei which practices a form of Malay-Muslim supremacy), cultures, and levels of economic development. Constitutionalism does not require a particular form of government as it concerns the inter-relationship between basic principles such as the rule of law and separation of powers and the coping strategies[25] constitutions employ to address common problems. These principles – informing institutional design, constitutional practice and rights adjudication – provide a universal vocabulary and common frame of reference, facilitating comparative work. Particularities matter, and are shaped by contextual factors like history, culture and religion, giving rise to distinctive if not unique features in Asian constitutions. This article deploys an idealised model of liberal constitutionalism as an organisational tool to highlight features of non-liberal constitutionalism in their full variety; this illuminates how constitutionalisms in Asia converge or diverge from the WLC model, which will facilitate the construction of an analytical framework for thinking about constitutionalism in Asia. In fact, most constitutions are 'mixed' in having both liberal and non-liberal elements, which works to prevent either impulse from gaining absolute ascendancy.[26]

After setting out the key features of WLC, the article then examines three main 'varieties' of non-liberal constitutionalisms against various questions: these include whether constitutions buttress or hold government power to meaningful account, whether popular or democratic will is given effect, how individual and group interests are treated and secured, and the relationship of constitutions towards religion as a competing or co-opted ideology, and freedom of conscience as a constraint on state power. The first variety considered are non-liberal secular and religious constitutionalism, with the intent to demonstrate a range of state-religion relations beyond strict separationism, and how religious freedom is affected under these regimes. These models are distinct from pure theocracies where religious and political authority are fused; under theocratic or religious constitutionalism, political authority is vested in a political figure rather than religious leader, who operates within the constitutional framework. Religious leaders may be allocated a constitutional role, such as Iran's Guardian Council staffed by six Islamic law experts whose functions include ensuring the compatibility of legislation passed by the Islamic Consultative Assembly 'with the criteria of Islam and the Constitution.'[27] Second, socialist constitutionalism, as practiced in countries like China, Vietnam, Laos. Third, non-socialist or 'communitarian' constitutions which evince a strong national identity and communal culture, promote moral solidarity, responsible citizenship and social harmony, anchoring a strong, interventionist state.

Key Features of Western Liberal Constitutionalism

With the caveat that expressions of WLC are not singular, four archetypical features may be identified. First, the meta-liberal norm prioritising individual autonomy as a chief way of restraining public power, based on ideas of human dignity, liberty and equality, which has frequently translated into rights-based court-centric constitutionalism. While the focus in the Anglo-American model has been on civil and political rights, socio-economic rights are found in European models.

[25]Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771, 794.

[26]Graham Walker, 'The Mixed Constitution after Liberalism' (1996) 4 Cardozo Journal of International & Comparative Law 311.

[27]Constitution of the Islamic Republic of Iran, art 94.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Second, the idea of the 'neutral state', where the state does not overtly subscribe to a substantive conception of the good, but leaves it to individuals to define their conception of the 'good life'; this presumes that the state is indifferent towards the character formation of its citizens. However, one may point out that the liberal state is not neutral as it seeks not only to protect but to produce individuals who are choice-oriented, experimental, cosmopolitan and autonomist.[28] Third, a secular orientation which mandates a separation of political and religious authority. Fourth, limited government based on popular consent, competitive multi-party elections, constitutional review, the rule of law and the separation of powers.

The Influence of WLC models in Asia - Preliminary Observations

There are Asian constitutions which are inspired by WLC models and expressly endorse multi-party liberal democracy in their constitutions;[29] but aspiration and reality are two different creatures. For example, Article 6(d) of the 2008 Myanmar constitution states as a basic principle the 'flourishing of a genuine disciplined multi-party democratic system.' It does not observe the principle of civilian control over the military: Article 109 reserves 25 per cent of the legislative seats to the Defence Services, to which Article 6 accords a leading role in national politics. Notably, a constitutional amendment bill requires the support of more than 75 per cent of parliamentary representatives, under Article 463(b). The February 2021 military coup which lead to the arrest and detention of civilian government leaders, including Aung San Suu Kyi and members of the National League for Democracy, after the army-backed opposition lost the parliamentary elections in November 2020, shows the precariousness of constitutional democracy in Myanmar.[30] In Thailand, the liberal democratic project is disrupted by frequent military interventions, which leads to anti-democratic rule by decree, as where Article 44 of the 2014 Interim Constitution vested the military dictator turned Prime Minister with legislative, executive and judicial powers. In addition, military appointees were involved in drafting Thailand's twentieth constitution since 1932.[31] Adopted in 2017, the latest iteration strengthens the army, who are empowered to appoint the upper house and to have six reserved seats there.[32] Military government, or according the military a permanent role in civilian affairs, negates popular sovereignty and, unsurprisingly, populist movements continue to demand amendments to the unpopular *2017 Constitution of the Kingdom of Thailand* (2017 Thai Constitution).[33]

In terms of legal transplants, the Westminster system of parliamentary government has travelled well to Asia, inspiring government systems beyond its former British colonies, like Thailand and Bhutan.[34] Since the end of absolute monarchy in 1932, the Thai King has been a constitutional monarch, not unlike the Queen of England who reigns but does not rule, and who mostly acts on the advice of the Cabinet. Chapter I Section 2 of the 2017 Thai Constitution declares that

[28]Stephen Macedo, *Liberal Virtues: Citizenship, Virtue and Community in Liberal Constitutionalism* (Clarendon Press, 1990), ch 5 ('The Constitution of Liberalism').

[29]Constitution of the Kingdom of Cambodia, art 1; Constitution of Timor Leste, s 7.

[30]'Myanmar coup: Aung San Suu Kyi detained as military seizes control' (BBC News, 1 Feb 2021) <https://www.bbc.com/news/world-asia-55882489> accessed 11 Aug 2021.

[31]Kittiping Tavevong 'With 20 constitutions, Thailand joins a select league' *The Nation* (24 May 2017) <https://www.nationthailand.com/perspective/30317723 accessed 11 Aug 2021.

[32]Oliver Holmes, 'Thailand's king signs constitution that cements junta's grip', *Guardian* (6 Apr 2017) <https://www.theguardian.com/world/2017/apr/06/thailand-king-signs-constitution-path-polls-election> accessed 11 Aug 2021.

[33]'Thai lawmakers debate demands for constitutional changes' (Channel News Asia, 17 Nov 2020) <https://www.channelnewsasia.com/asia/thailand-protests-parliament-constitution-prayut-monarchy-545521> accessed 19 Aug 2021; Khemthong Tonsakulrungruang, 'An uphill battle for a constitutional amendment in Thailand' (Verfassungsblog, 2 Dec 2020) <https://verfassungsblog.de/an-uphill-battle-for-a-constitutional-amendment-in-thailand> accessed 11 Aug 2021.

[34]Winne Bothe, 'In the name of king, country and people on the Westminster model and Bhutan's constitutional transitions' (2015) 22 Democratization 1338.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Thailand adopts 'a democratic regime of government with the King as Head of State.' This would appear unexceptional, except that informal factors such as the monarch's enormous influence on the conduct of politics must be considered. While sovereign power belongs to the people (Chapter I, Section 3), it is the King who grants his royal assent and promulgates the Constitution to his subjects. The sacred King is 'enthroned in a position of revered worship' (Chapter II, Section 6), immunised from critique by onerous *lèse-majesté* laws that silence dissent.[35] All government leaders in this deference-based society must prostrate themselves before him.

By dint of his personal prestige, the late King Bhumibol was able to end past conflicts between security forces and pro-democracy protestors. In May 1992, the King defused a major political conflict by summoning the military junta leader and his chief opponent where, on national television, they were humbled and seen crawling on their knees to receive a scolding from the King.[36]

Westminster models which inspire Asian systems are adopted and modified. For example, the *Druk Gyalpo* (King) of Bhutan, which became a parliamentary democracy in 2008 after centuries of theocratic rule, has more powers than a Westminster ceremonial head of state. He retains certain prerogative powers which include granting citizenship, amnesties and commanding the introduction of bills in Parliament under Article 2(16) of the *Constitution of the Kingdom of Bhutan* (Bhutan Constitution). The hereditary monarch must step down at age 65 (Article 2(6)). In Nepal, the single member constituency gave way to a mixed system, with 165 parliamentarians directly elected, and 110 through a system of proportional representation. Since 1991 when Nepal became a multiparty democracy with the end of autocratic monarchy, this system has seen a plurality of parties in Parliament, the implosion of parties through internal rivalries, weak coalition governments and a revolving door of Prime Ministers.[37]

As far as former British colonies like India, Malaysia, and Singapore are concerned, constitutions may be shaped by colonial history as much as by autochthonous experiments; how transplanted Westminster constitutions, which rely heavily on political constitutionalism,[38] operate in practice depends on the socio-political and cultural environment. Central to this is the need for supportive civil-political liberties, a vibrant press, and multi-party competitive elections where an alternative government is waiting in the wings to assume office, and where the incumbent may be sanctioned at the ballot box. Where these factors are absent, the Westminster model has operated as a one-party or dominant-party state in Africa and Asia, where Cabinet governments have enjoyed virtually untrammelled power. Political turnover has yet to materialise in post-independence Singapore, which has attracted the epithet of 'authoritarian constitutionalism',[39] while Malaysia first experienced this in 2018 when the ruling Barisan Nasional lost the general elections.

Singapore, in particular, has trod an autochthonous path, developing the constitution by amendment, which requires a two-third parliamentary majority that the ruling party can easily secure. The ruling party controls 83 of 93 elected seats since the 2020 General Elections, after which, for the first time, the office of the Leader of the Opposition was formally recognised.[40] Unlike Sri Lanka, which

[35]'Thai court gives record 43-year sentence for insulting king' (Channel News Asia, 19 Jan 2021) <https://www.channelnewsasia.com/asia/thai-court-record-43-year-sentence-insulting-king-lese-majeste-417811> accessed 19 Aug 2021. See Eugénie Mérieau, *Constitutional Bricolage: Thailand's Sacred King versus the Rule of Law* (Hart Publishing 2021).

[36]Alan Strathern, 'The last sacred kings' (Aeon, 4 Oct 2017) <https://aeon.co/essays/the-sacred-monarchies-that-survive-into-the-postmodern-age> accessed 11 Aug 2021.

[37]Patrick Weller & Bishnu Sharma 'Transplanting Westminster to Nepal: The stuff of dreams dashed', in Haig Patapan, John Wanna & Patrick Weller (eds), *Westminster legacies: democracy and responsible government in Asia and the Pacific* (UNSW Press 2005) 63–80.

[38]Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007)

[39]See Kevin YL Tan, 'Is Singapore an authoritarian constitutional regime? So what if it is', in Weitseng Chen & Hualing Fu (eds), *Authoritarian Legality in Asia: Formation, Development and Transition* (Cambridge University Press 2019) 187–201.

[40]Chew Hui Min, 'Parliament confirms duties, privileges for Pritam Singh as Leader of the Opposition' (Channel News Asia, 31 Aug 2020) <https://www.channelnewsasia.com/singapore/leader-of-opposition-pritam-singh-duties-privileges-

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

exchanged its parliamentary system for a Gaullist inspired executive presidential one in 1978,[41] Singapore retained the basic Westminster framework and made incremental changes to it. It created unelected non-constituency parliamentarians to institutionalise political party pluralism and sought to diversify the range of views articulated through nominated parliamentarians who have specialist knowledge and no political affiliations. In a unique experiment in fiscal or economic constitutionalism,[42] the President is no longer merely a ceremonial head of state but is directly elected and vested with limited supervisory powers over budgets and transactions eating into reserves in the national savings account, ostensibly to check irresponsible spending.[43] However, Singapore still refers back to Westminster practice in matters relating to parliamentary privileges and immunities,[44] and the nature of the head of state's ceremonial functions, though the courts have underscored the importance of establishing the doctrinal basis for government powers 'on autochthonous constitutional grounds informed by our own national circumstances.'[45]

Other influential models are the US presidential system in the Philippines and the adoption of constitutional courts styled after the Austrian/German model.[46] Judicial review as a means of controlling executive power and legislation originated in Western legal systems. It is incompatible with Sino-traditions which view the Emperor as the Sovereign who wields indivisible powers buttressed by the mandate of heaven; appointed officials are not empowered to effectively check the Sovereign. It is also incompatible with Marxist-Leninist theory, which vests ultimate power in the supreme will of the people as expressed through a people's congress, which wields legislative power and supervises the enforcement of the constitution.[47] In jurisdictions like Brunei, where the Sultan enjoys supreme executive authority, Section 84C of the Constitution precludes judicial review over any of his acts or omissions, or those of his delegates, raising the spectre of administrative despotism.

As a foreign import, judicial review has nonetheless been able to take root in post-authoritarian Asian states with specialist constitutional courts facilitating and consolidating the transition to democracy.[48] Scholars have described as 'East Asian Constitutionalism'[49] the phenomenon of courts in Japan, South Korea and Taiwan adopting and operating review mechanisms; these have hastened the end of authoritarianism and nominal constitutionalism and ushered in vibrant constitutional democracies, against the backdrop of strong economic development, competitive elections and an active civil society. This is situated as a distinctive model between WLC's romanticised vision of popular sovereignty as the fruit of a revolutionary moment, the exaltation of liberty and judicial

parliament-638081> accessed 11 Aug 2021. See Kevin YL Tan, 'Legislating Dominance: Parliament and the Making of Singapore's Governance Model', in Lily Zubaidah Rahim & Michael D Barr (eds), *The Limits of Authoritarian Governance in Singapore's Developmental State* (Palgrave Macmillan 2019) 257–275.

[41]A Jeyaretnam Wilson, *The Gaullist System in Asia: The Constitution of Sri Lanka* (Palgrave Macmillan 1978).

[42]See Li-ann Thio, 'Past Imperfect, Future Tense: The Elected Presidency and the Constitutional Development of an 'Ever Evolving Hybrid', in Jaclyn L Neo & Swati Jhaveri (eds), *Constitutional Change in Singapore: Reforming the Elected Presidency* (Routledge 2019) 41–66.

[43]See Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing 2012) 304–312, 394–450.

[44]Parliamentary (Privileges, Immunities and Powers) Act (Cap 217, 2000 Rev Ed), s 3(1).

[45]*Comptroller of Income Tax v ARW* [2017] SGHC 180 para 35 (Aedit Abdulllah JC).

[46]Tom Ginsburg (ed), *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003); Andrew Harding (ed), *Constitutional Courts: A Comparative Study* (Wildy, Simmons & Hill Publishing 2009).

[47]Constitution of the People's Republic of China, arts 58 and 62.

[48]For works which focus on the role of Asian courts in relation to constitutionalism, see Rohit De, *A People's Constitution: The Everyday Life of Law in the Indian Republic* (Princeton University Press 2020); Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press 2017); Yvonne Tew, *Constitutional Statecraft in Asian Courts* (Oxford University Press 2020); Albert HY Chen & Andrew J Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press 2018).

[49]Wen-Chen Chang & Juinn-Rong Yeh, 'The Emergence of East Asia Constitutionalism: Features in Comparison' (2011) 3 American Journal of Comparative Law 805.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

review as defiant counter-majoritarianism, and the 'Asian values' model as a thinly veiled apology for power in the name of communal interests, to the neglect of individual rights.[50]

The East Asian constitutional courts have demonstrated willingness to strike down unconstitutional legislation and executive action, to be the arbiter on matters of high politics and a venue for those seeking social reform. In this process, constitutional review, while securing individual rights and the rule of law, has developed distinctive features. Some scholars[51] judge the vitality of these courts through their rights expansive orientation, the number of litigated cases and unconstitutional rulings issued, taken as proof of an active, independent judiciary comparable with judicial performances in the 'West', indicating the attainment of liberal democratic constitutionalism. Particularly noteworthy are decisions which go against traditional Confucianist gender inegalitarian precepts, which have shaped East Asian societies, in response to the women's social movements in these countries.[52] Nonetheless, these East Asian Courts were 'cautious' in refraining from going against majoritarian preferences by advancing their own agenda. Instead, they reacted strategically in reinforcing public opinion; showing sensitivity to political realities and institutional restraints they have refused to take political sides, often through ambiguous decisions.[53]

Culture may have eased the reception of the 'Western' institution of constitutional review in South Korea and Taiwan, which there was resistance against active judicial review in the era of the strong executive.[54] Unlike the US Supreme Court's 'one note' model of striking down unconstitutional legislation, which is confrontational in tenor, a variety of orders may flow from constitutional review. This is more aligned with the Confucian notion of remonstrance in promoting a dialogical approach between institutions, rather than just holding an Act to be constitutional or unconstitutional and immediately void.

The Korean constitutional court, borrowing from the German court and its practice of finding levels of constitutionality may, for example, hold that an Act does not conform to the constitution, requiring legislative amendment in the near future; it may find part of the Act unconstitutional and sever it; the Act can be found to be constitutional but applied in an unconstitutional manner; or the Act may be found to be constitutional, provided it is interpreted in a certain way.[55] As Ginsburg points out, these 'gradations' allow the courts to avoid openly challenging the executive and legislature and to instead take the less threatening approach of dialogue, providing guidance or suggesting reform to motivate or pressure the government to reconsider their decision after taking the constitutional interpretation into account.[56] This brand of 'Confucian constitutionalism' is reflected in the sensitivity courts show to high political authority like the President, and their preferences, paralleling the sensitivity shown by mandarins to Emperors in 'remonstrating' with them, making suggestions, giving advice, offering warnings, but not making demands or striking down laws and actions.[57]

The adoption of WLC based models does not preclude innovation. At independence or significant constitutional (re)-making moments, states are able to constitutionalise their priorities; the post-authoritarian *1987 Constitution of the Republic of the Philippines* (1987 Philippine Constitution) signalled the importance of protecting civil-political rights by creating the then novel National Human Rights Commission,[58] and its commitment to patrimony, through directive

[50]ibid 834, 839.
[51]ibid 823, 832.
[52]ibid 833.
[53]ibid 824, 835
[54]See eg, Bui Ngoc Son, *Confucian constitutionalism in East Asia* (Routledge 2016).
[55]Tom Ginsburg, 'Confucian Constitutionalism – The Emergence of Constitutional Review in Korea and Taiwan' (2002) 7 Law and Social Inquiry 763, 780.
[56]ibid.
[57]ibid 792–793.
[58]Raul Pangalangan, 'Why a Philippine Human Rights Commission? Its Place in a Constitutional Order', in *Perspectives of Constitutionalism in Asia* (Japan Association for Studies of Constitutional Law 1999) 285–300.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

principles requiring the state to enter into production-sharing agreements relating to natural resources, wherein Filipino citizens own at least 60 per cent of the capital (Article XII, Section 2). Constitutional hybridity becomes the norm, as newer constitutions borrow from more established ones, adapting these and striking autochthonous notes resonant with local particularities.

Religious Constitutionalism

There are two key questions when it comes to religion and constitutions, bearing in mind the 'secularisation thesis' holds no water in Asia, the birthplace of many great religions, where religion remains an important part of personal identity and public life, even within formally secular, modern states. The first question is how a constitution structures the state (political authority) and religion (religious authority). This could be answered with dualist spheres of sovereignty model, or a constitutional monist model, where religion and state are arranged hierarchically in a superior/subordinate fashion, or where autonomy regimes and subsidiarity limit state power. The second question is whether the constitution in question secures religious freedom for individuals and groups. Here, both questions of jurisdiction and liberty are implicated, as legal limits on constitutional government.

Scholars have recognised a category of theocratic or religious constitutionalism,[59] distinct from pure theocracies where religious and political authority are unified in one person or a group. Religious constitutionalism, where preferential treatment is accorded to a religion(s) and there is no strict requirement of state impartiality towards religions, is predicated on a formal separation between religious and political authority. In this setting, all public officials operate within the constitutional framework, and institutional checks prevent religious or irreligious autocratic rule. In Asia, religious constitutionalism, where the state identifies with one specific religion, mostly relates to Buddhist (Sri Lanka, Thailand, and Bhutan) or Islamic polities (Pakistan, Malaysia, and Brunei). Historically, Nepal was a Hindu Kingdom, although it was declared a secular state in 2007, and adopted a secular federal democratic constitution in 2015 which envisaged the polity as multi-ethnic and multi-religious. 'Strong religion' also influences politics, for example, Catholic-majority Philippines and Timor Leste, Hindu-majority India, and Muslim-majority Indonesia.

Religious constitutionalism stands between the extremes of theocracies and anti-theistic strict separationist regimes which privatise and trivialise religion in favour of humanist ideology. Both of these models are inimical to religious freedom as constitutions of 'absolute truth' which brook no dissent to the official ideological narrative. Religious constitutionalism seems to stand at odds with secular constitutionalism insofar as the modern European Enlightenment project sought to sever any tie between the divine and law; sovereignty is transferred from a divine or sacral source, to 'one of us, some of us, all of us',[60] through some form of popular, parliamentary or personal sovereignty.

The archetypical secular liberal constitution dichotomously orders the public (temporal) and private (sacred); the social dimension of religion is minimised or excluded from the public sphere. Such constitutions do not identify with or endorse any religion, accord religion a constitutional status which influences law-making or judicial interpretation, nor grant official status and jurisdiction to religious bodies, operating in tandem with or in lieu of civil courts. As a constitution of pluralism, anti-theocratic but not anti-theistic secular constitutions liberate the state from pursuing truth or protecting religious orthodoxy, in favour of a free marketplace of ideas. Secular governments are to be impartial and even-handed between religions and are bound to protect the religious freedom of individuals and groups, particularly freedom of conscience; here, religious (or irreligious) identity is treated as voluntarist, a matter of personal choice rather than external regulation.

[59]Ran Hirschl, *Constitutional Theocracy* (Harvard University Press 2010); LC Backer, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering' (2006) 16 Indiana Journal of Global Legal Studies 85–172.

[60]Arthur Allen Leff, 'Unspeakable Ethics, Unnatural Law' [1979] Duke Law Journal 1229, 1233.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

A secular constitution requires separation between politics and religion, but the general reality is that even for *laik* states, this is a question of degree, given the varieties of secularism.[61] A range of religion-state relations models exist between theocracies and strict separationist regimes, variously described as establishment, cooperative, and accommodative models.[62] So too, for religious constitutionalism, where religious law and religious bodies are given an official constitutional role, elements of democracy may be mixed in and power is not unbounded but structured. The question of the effectiveness of institutional checks and religious freedom guarantees are pertinent in examining religious constitutionalism, and indeed, constitutional secularism.

Key features of religious constitutionalism, where a special status is given to religion(s), as opposed to an idealised vision of secular liberal constitutionalism, may be identified through examining four main factors; Asian constitutions provide fruitful case studies in this respect.

First, whether the constitution provides that religious law is *the* or *a* source of general law. The preamble of the *1973 Constitution of the Islamic Republic of Pakistan* (the Pakistani Constitution) provides that the state exercises its power through the people, to be discharged as a sacred trust to God, within the context of a democratic state based on Islamic principles of social justice. Article 2 identifies Islam as the state religion which receives preferential treatment, as reflected in authorised imposition of reasonable free speech restrictions on various grounds including 'in the interest of the glory of Islam' (Article 19). The Federal Shariat court, composed of eight Muslim judges appointed by the President (Article 203A), who must be a Muslim (Article 41(2)), may on its own motion or in response to a citizen's petition examine whether any law is repugnant to 'Injunctions of Islam' (Holy Quran and Sunnah: Article 203D); if it so finds, the President or Provincial Governor is to take steps to amend the law to bring it into compliance with Islamic injunctions. Article 228 provides for a Council of Islamic Ideology composed of members knowledgeable in the philosophy of Islam or understanding of Pakistan's socio-economic and political problems; their functions include advising Parliament on how to encourage Pakistani Muslims to live an Islamic lifestyle and to identify which 'Injunctions of Islam' may be given legislative effect (Article 230). Certain Islamic constitutions declare which school of 'Islam' applies.[63]

This is distinct from schemes of legal pluralism adopted in secular, non-liberal states, which liberal constitutions may also adopt, to accommodate religious minorities by authorising the creation of religious courts with limited jurisdiction over personal and family laws. An example would be the regime under the Singapore *Administration of Muslim Law Act*.[64]

Second, whether the Constitution privileges or discriminates against a religious sect. A government under a liberal constitutional order has no jurisdiction to pronounce on matters of religious orthodoxy and a key tenet of liberal orders is egalitarianism and non-discrimination, including on grounds of religion. Only Muslims can occupy the position of President in Pakistan, excluding all other (ir)religious minorities. Similarly, under Brunei's anti-secularist Malay Islamic Monarchy, where the Sultan enjoys absolute power, presumptively all Cabinet Ministers must be Malay Muslims (Article 4(5)). Further, Articles 260(3)(a) and (b) of the Pakistani Constitution engages theology in defining a 'Muslim' as one who believes in the finality of Prophet Muhammad, expressly defining 'Ahmadis' as 'non-Muslims' as they believe in a prophet who came after Muhammad. Ordinance XX of 1984 prohibits Ahmadis from calling themselves Muslims or to 'pose as Muslims.'

[61]Michael Warner, Jonathan Van Antwerpen & Craig Calhoun (eds), *Varieties of Secularism in a Secular Age* (Harvard University Press 2013).

[62]Ran Hirschl identifies 8 models. See Ran Hirschl, 'Comparative Constitutional law and Religion', in Tom Ginsburg & Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 422–440.

[63]For example, Article 2(1) of the Brunei Constitution identifies 'Islamic Religion' as that according to 'the Shafeite sect of Ahlis Sunnah Waljamaah.'

[64]Noor Aisha Abdul Rahman, 'Muslim Personal Laws and the Accommodation of Minorities: The Need to Better Balance Individual Rights and Group Autonomy in Singapore' (2019) 20 German Law Journal 1079–1095.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Third, the degree to which state and religion is entangled. Thai Buddhist constitutionalism reveals a deep entanglement between the state and Buddhism, as the state has oversight of the official monastic hierarchy and uses law to regulate the activities of Buddhist monks. Buddhist constitutionalism grapples with the regulatory question of how to use constitutions to organise power to 'balance royal/political authority and ecclesiastical authority'[65] in a way that safeguards Buddhist teachings and institutions, given that both governing elites and monks have a historical duty to protect Buddhism.

In Thailand, the government oversees the Supreme Sangha Council (SSC) or Buddhism's governing body, under the *1962 Sangha Act*. Orders flow from the centralised Sangha hierarchy in the form of a Supreme Patriarch and his Council of Elders, composing senior monks, outward to individual temples. The SSC may disrobe monks and such orders cannot be challenged in the Supreme Administrative Court, which held that the SSC had exclusive jurisdiction in such matters.[66] Notably, a lay bureaucrat, the Director-General of the Office of National Buddhism, sits on this Council, through whom the influence of royal/state authority is imported. Another clash between ecclesiastical and political authority arose when a 2017 petition brought before the National Human Rights Commission challenged the SSC's refusal to recognise female monks (*bhikkunis)* as gender discrimination, contrary to Section 27 of the 2017 Thai Constitution. In the interim, Thai female monks resort to going to Sri Lanka to get ordained.[67]

Amendments in 2016 to the *Sangha Act* allow the King to directly appoint the Supreme Buddhist Patriarch, with the Prime Minister countersigning, bypassing the SSC. The need for ministerial signatures to confirm the appointment and dismissal of monks shows state involvement in running monastic affairs. The 2017 Thai Constitution further empowers the state to be the final arbiter of legitimate monastic authority in regulating Buddhist orthodoxy and orthopraxy by providing for 'measures and mechanisms to prevent Buddhism from being undermined in any form,' which all Buddhists would be encouraged to participate in. This could address problems of regulating popular, non-mainstream Buddhist groups with alternative religious practices, such as the Dhammakaya sect. Similar state intrusiveness into religious autonomy is evident in avowedly secular, non-liberal states like China, whose constitution (*Constitution of the People's Republic of China*, herein the PRC Constitution) espouses 'socialism with Chinese characteristics' (Article 1), which may be seen as a form of 'secular religion'. The atheistic, Communist Chinese government has asserted its power to decide on who is to be Tibet's spiritual leader, the Dalai Lama's reincarnated successor.[68]

In contrast, Sri Lanka[69] has not adopted centralised state control over an official monastic hierarchy. Instead, the law devolves autonomy to individual temple abbots who have considerable powers to manage temple property and govern local monastic affairs. However, the decentralisation model means no single monastic body may speak authoritatively on behalf of all Buddhists. The state through the civil courts have had to take stances on questions of Buddhist orthopraxy, which presents a regulatory crisis in the face of divided Buddhist opinion. Thus, a policy of not granting driving licences to Buddhist monks was judicially upheld, as part of the state's duty to 'protect and foster' Buddhism under Article 9. The court, which examined materials on Buddhist teachings and the historical practice of Kings who purified the *Sasana* of corruption, sided with

[65]Benjamin Schonthal, 'Formations of Buddhist Constitutionalism in South and Southeast Asia' (2017) 15 International Journal of Constitutional Law 705, 708. See also Eugénie Mérieau, 'Buddhist constitutionalism in Thailand: When Rajadhamma Supercedes the Constitution' (2018) 13 Asian Journal of Comparative Law 283–305.

[66]Tomas Larsson, 'Keeping monks in their place?' (2016) 3 Asian Journal of Law and Society 17–28.

[67]Tan Hui Yee 'Thailand's unrecognized daughters of Buddhism' *Straits Times* (11 Mar 2017) <https://www.straitstimes.com/asia/se-asia/thailands-unrecognised-daughters-of-buddhism-field-notes> accessed 12 Aug 2021.

[68]'China sticks to right to decide reincarnation of Dalai Lama' (Reuters, 30 Nov 2015) <https://www.reuters.com/article/us-china-tibet-idUSKBN0TJ0LN20151130> accessed 19 Aug 2021.

[69]Benjamin Schonthal, *Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka* (Cambridge University Press 2016).

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

a view that allowing monks to drive would offend the Buddhist way of life and Buddhist culture, as the life of a Buddhist monk, distinct from a lay person, requires sacrifices. This entailed rejecting the view of other Buddhist monks that driving would facilitate the more efficient discharge of their religious duties.[70] Unusually for a decentralised monastic system, the court's articulation of its own understanding of monastic discipline entailed the state's dictating standards of conducts to Buddhist monks.

While Thai monks are constitutionally prohibited[71] from voting, as part of the separation of temple and state, as they are expected to be detached from politics, Sri Lankan monks are politically active, can vote, and have founded political parties like the JHU to contest elections. Further, contrary to their pacific faith, extremist monks seeking to promote Sinhalese Buddhist primacy have undertaken violent acts against religious minorities like Christians and Muslims, resulting in deaths and property destruction.[72] Religious groups are active in the Sri Lankan public sphere to an extensive degree, showing plural practices within Theravada Buddhist contexts.

Fourth, where a Constitution identifies with a specific religion but recognises other religions may be practiced 'in peace and harmony', the question is whether other religions are treated in an even-handed manner, and whether religious freedoms are safeguarded, or whether the state takes a 'protectionist' stance in relation to the 'confessed' faith. In Malaysia, Islam is the religion of the Federation (Article 3) and the state may fund Islamic institutions and the provision of Islamic instruction under Article 12(2). The Constitutions of Bhutan, Cambodia, Thailand, Myanmar and Sri Lanka all identify as democratic regimes, two having Buddhist constitutional monarchies,[73] but accord special recognition to Buddhism, while affirming the rights of other religions. These Constitutions require the state to promote the Buddhist *Sasana* (teaching),[74] the 'dharmic principles of Theravada Buddhism;'[75] Article 3 of the Bhutan Constitution[76] declares the monarch (*Druk Gyalpo*) is the 'protector of all religions in Bhutan' and requires religious institutions to promote Buddhism, the 'spiritual heritage' of Bhutan, 'while also ensuring that religion remains separate from politics in Bhutan.' These provisions reflect religious preferentialism.

Constitutions which are protective of a specific religion, or where a religious majority wishes the state to advance their religion, tend to be antagonistic towards the right of propagation or evangelism. Article 4 of the *2015 Constitution of Nepal* defines 'secular' as protecting only those religions practiced 'since ancient times' like Hinduism, presumably excluding later missionary religions. Article 26(1) defines religious freedom as the right to 'profess, practice and preserve' one's religion while clause 3 sets its face against evangelism and freedom of conscience by providing that, in exercising this right, one must not 'covert a person of one religion to another religion, or disturb the religion of other people.' Article 7 of the Bhutan Constitution provides that a Bhutanese citizen enjoys freedom of thought, conscience and religion and adds '[n]o person shall be compelled to belong to another faith by means of coercion or inducement,' which is a fourth degree felony under the Bhutanese Penal Code. Despite the constitutional norm of tolerance, the Bhutanese government is hostile towards 'foreign' missionary religions like Christianity which is seen to threaten

[70] *Paragoda Wimalawansa Thero v Commissioner of Motor Traffic* (Judgment of 31 March 2014)(unreported). See Benjamin Schonthal, 'Securing the Sasana through Law: Buddhist Constitutionalism and Buddhist-interest litigation in Sri Lanka' (2016) 50(6) Modern Asian Studies 1966–2008.

[71] Constitution of the Kingdom of Thailand 2017, ch VII, pt II, s 96.

[72] Rohini Mohan, 'Sri Lanka's Violent Buddhists' *New York Times* (2 Jan 2015) <https://www.nytimes.com/2015/01/03/opinion/sri-lankas-violent-buddhists.html> accessed 19 Aug 2021; Hannah Beech, 'Pacifists no more: Militant Buddhism is on the march in Sri Lanka' *The Independent* (13 Jul 2019) <https://www.independent.co.uk/news/world/asia/buddhism-pacifism-militant-violence-sri-lanka-a8997631.html> accessed 13 Aug 2021.

[73] Constitution of the Kingdom of Bhutan 2008, art 2; Constitution of the Kingdom of Thailand 2017, ch II, s 7.

[74] Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 9.

[75] Constitution of the Kingdom of Thailand 2017, ch VI, s 67.

[76] Darius Lee, 'Here there be Dragons! Buddhist Constitutionalism in the Hidden Land of Bhutan' (2014) 15 Australian Journal of Asian Law 1–19.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Bhutanese values and societal cohesion. Government ministers, reflecting a commitment to ideological relativism, reject the idea of one right, superior religion, and consider it a form of corruption to offer economic inducements to the poor to convert. The enactment of laws first banning Christian and then Islamic or any other alien religious proselytism indicates a protective attitude towards Buddhism and sympathy towards Hinduism 'since the Hindus and Buddhists worship almost the same gods and goddesses.'[77]

The idea of preventing religious conversions by coercion or inducement also underlies anti-propagation legislation in Sri Lanka and India,[78] supported by the Buddhist and Hindu majority respectively. While the Malaysian Article 11(1) protects the right to profess, practice and propagate a religion, Clause 4 authorises laws prohibiting the propagation of another faith to a person professing Islam. The Malaysian government not only protects but actively offers economic incentives to indigenous peoples to encourage their conversions to Islam and assimilation to mainstream Malay society.[79] This protectionist approach towards Islam is evident in apostasy cases, where a Malay Muslim wants to convert to another religion. Where Islam is not involved, someone can convert from religion A to B without any problem, which vindicates free conscience.[80] However, where Islam is concerned, Malaysian courts have held that Article 11 does not embody freedom of conscience or the right to renounce a religion. This straitened reading of Article 11 was based on importing in the Article 3 reference to Islam, in a revisionist attempt to treat 'Islam' not as a mere ceremonial reference as the constitutional drafters understood it, but as a source of substantive public law, to effectively apply divine law (or a certain school of it) to a man-made legal order. This is evident in the High Court decision of *Lina Joy v Majlis Agama Islam Wilayah,*[81] where a civil judge took a controversial particular interpretation of what Islam requires in interpreting the religious freedom guarantee in relation to a case of religious conversion.

The High Court held that if a Malay Muslim woman wanted to become a Catholic, she needed to obtain a declaration of apostasy from a religious court, though this would expose her to the possibility of detention at a religious rehabilitation centre. There are no exit rights; instead, permission to leave Islam is needed from the religious authorities to avoid causing 'chaos and confusion' within the Muslim and non-Muslim community as a whole. Professing or changing a religion was treated not as a personal right but as a highly sensitive public order issue, as the Muslim community considered renunciation of Islam a 'very grave matter,' it being their responsibility 'to save another Muslim from the damnation of apostasy.'[82] The Federal Court abdicated its responsibility of protecting religious liberties, finding that conversion matters fell within Syariah court jurisdiction even if fundamental liberties were implicated. [83] This reading flows from a belief that Islam is an 'absolute truth' and that Muslims cannot unilaterally depart from this, which undermines pluralism and individual autonomy in matters of conscience and faith. Further, the High Court declared that the ethnically Malay plaintiff must remain 'in the Islamic faith until his or her dying days', as Article 160(2) defines a 'Malay' as someone 'who professes the religion of Islam, habitually speaks the

[77]'Regarding the Spread of New Sects of Hinduism' (Bhutan National Assembly, 65th Session, 1987) 13 <http://www.nab.gov.bt/downloads/2565th%20Session.pdf.> accessed 9 May 2021.

[78]Li-ann Thio, 'Caesar, Conscience and Conversion: Constitutional Secularism and the Regulation of Religious Profession and Propagation in Asian States' [2011] Fides et Libertas 127 <https://www.irla.org/fides-2011.pdf> accessed 19 Aug 2021.

[79]Toshihiro Nobuta, 'Islamization Policy towards the Orang Asli in Malaysia' (2007) 31 Bulletin of the National Museum of Ethnology 479–495.

[80]Khairah N Karim, 'Women succeeds in 6-year legal battle to be recognised as non-Muslim' *New Straits Times* (5 Feb 2021) <https://www.nst.com.my/news/crime-courts/2021/02/663290/woman-succeeds-6-year-legal-battle-be-recognised-non-muslim> accessed 12 Aug 2021; *Rosliza Ibrahim v Kerajaan Negeri Selangor et al* [2021] 1 LNS 30

[81][2004] 2 MLJ 119. For a critical analysis of the constitutional issues, see Thio Li-ann, 'Apostasy and Religious Freedom: Constitutional Issues arising from the Lina Joy litigation' [2006] 2 MLJ i; for a response, see Shamrahayu A Aziz, 'Apostasy and Religious Freedom: A Response to Thio Li-ann' [2007] 2 MLJ i.

[82]*Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2005] 6 MLJ 193, 208 (Abdul Aziz Mohamad JCA).

[83]*Lina Joy v Majlis Agama Islam Wilayah* [2007] 4 MLJ 585 (Federal Court, Malaysia).

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Malay language and conforms to Malay custom.' This illiberal conflation of ethnicity and religion, and determination of religious identity by legal ascription rather than personal choice, oppressively denies human agency and religious freedom, in order to safeguard one particular religion.

In contrast, Singapore's Article 15, which borrows from Malaysia's Article 11, does not authorise anti-propagation legislation; Singapore rejected proposals for this as it considered the preferential treatment of one religion contrary to the principles of secular democracy. The Court of Appeal established freedom of conscience as the basis for religious freedom which is 'premised on removing restrictions of one's choice of religious belief', pursuant to the Singapore model of 'accommodative secularism.'[84] This flows from an even-handed or impartial attitude towards religions, as opposed to a protectionist posture. To conflate 'Malay' (ethnicity) with 'Muslim' (religion) in Singapore would be unconstitutional; the government's role is to maintain a framework to facilitate religious profession choices, and to guard against coercive religious conversion. Insofar as secular constitutionalism protects free conscience and takes no view on religious orthodoxy, it better secures constitutionalist objectives of limited government and liberty than a brand of religious constitutionalism unprotective of free conscience. Religiously preferential constitutions may provide a guarantee of liberty of conscience, but whether this is practically realised is a different matter.

Issues about the scope of religious freedom and how the state relates to religion also attaches to liberal and non-liberal 'secular constitutionalism' models. 'Secularism' itself is a protean term and Asia presents a rich landscape for mining what a secular constitution requires or permits, and the degree to which it interacts with religious matters. India's ameliorative secularism does not strictly separate religion and state; Article 25(2) authorises the state to require religious institutions of a public character to be open to all Hindu classes, in the interests of social reform and eradicating religious casteism. The Philippines Supreme Court[85] has taken a stricter view of separation by holding that the non-establishment clause found in Article III, Section 5 of the 1987 Philippines Constitution was violated by the involvement of the Office of Muslim Affairs in halal certification, violating the American-inspired separation of Church and State idea. Conversely, this is not unconstitutional under the Singapore Constitution, which has no non-establishment clause, where a more pragmatic secularism is practiced. Here, the Singapore Constitution mandates the creation by statute of the Islamic Religious Council (MUIS), the leading official Islamic body, which undertakes halal certification, a theological matter implicating Muslim dietary rules. Secular laws can thus create statutory bodies with oversight over religious matters, without infringing any principle of secularity; halal certification laws are generally applied to both Muslims and non-Muslims as strict liability offences, indicating Parliament's solicitude over religious sensitivities, and fulfillment of its constitutional obligation to care for the predominantly Muslim Malays, as part of its commitment to a multi-racial, multi-religious secular state.[86]

Socialist Constitutionalism

Asian states like Vietnam, Laos and China have Marxist-Leninist constitutions which are secular, expressly espouse a comprehensive socialist ideology, celebrate socialist heroes like Ho Chi Minh and Mao Zedong, and are led by a single party based on 'democratic centralism.'[87]

[84] *Nappalli v ITE* [1999] 2 SLR 569 para 28.

[85] *Islamic Da'Wah Council of the Philippines Inc v Office of Muslim Affairs* GR No 153888 (Jul 9, 2003)(Supreme Court of the Philippines).

[86] Thio Li-ann, 'Courting Religion: The Judge between Caesar and God in Asian Courts' (2009) Singapore Journal of Legal Studies 52.

[87] Constitution of the Lao People's Democratic Republic 2015, art 5; Constitution of the People's Republic of Vietnam 2013 ('Vietnam Constitution'), art 8(1); Constitution of the People's Republic of China, amended 14 Mar 2004 ('PRC Constitution'), art 3. See generally Ngoc Son Bui, 'Constitutional amendment in Laos' (2019) 17 International Journal of Constitutional Law 756–786; Fu Hualing & Jason Buhi, 'Diverging Trends in the Socialist Constitutionalism of the People's Republic of China and the Socialist Republic of Vietnam', in Hualing Fu et al (eds), *Socialist Law in Socialist East Asia* (Cambridge University Press 2018) 135–163; Qin Qianhong & Ye Haibo, *Socialist Constitutionalism* (City University of Hong Kong Press 2017).

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Their constitutional preambles recount threats of foreign invaders, revolutionary struggles and the triumph of 'correct leadership' in the form of the Laos People's Revolutionary Party as the 'leading nucleus' (Article 3, *1991 Constitution of the Lao People's Democratic Republic*); the Communist Party of Vietnam as the 'leading force of the State and society' (Article 4, *2013 Constitution of the Socialist Republic of Vietnam*); and the Communist Party of China which leads the people under the guidance of 'Marxist-Leninism, Mao Zedong Thought, Deng Xiaoping Theory' and Jiang Zemin's 'three represents.'[88] The collective identity of the state and its members is clearly spelt out, and restrictions placed on activities which would undermine the socialist system. Plural political competition is not permissible, given the Party's claim, as an absolute truth, to be the best guardian of the country's interests. Where democracy is invoked as a basis for legitimacy, this means a different thing in the socialist context then it does in democracies that are predicated on competitive, free and fair elections.

These constitutions are committed to the enterprise of forming patriotic citizens,[89] in whom power formerly inheres.[90] Public power is exercised on behalf of the people by a National Assembly (Laos, Vietnam) or National People's Congress (China) which are declared to be the highest organ of state power,[91] responsible to the people and subject to their supervision.[92] Chinese citizens have the constitutional right to lodge complaints and denunciations against state bodies, and state officials are urged to struggle against 'bureaucracy, arrogance and authoritarianism.'[93] In turn the state promotes the cultivation of citizens who are to be 'profoundly patriotic' and who must show 'absolute loyalty to the Fatherland, the People, the Party and the State.'[94] The people are to be united by ideological commitment; fears of social disintegration and ethnonational separatism are addressed through constitutional affirmations that the state is 'a unitary multinational state created jointly by the people of all its nationalities;'[95] the goal to 'combat Han Chauvinism' is expressly avowed in the PRC constitutional preamble. The PRC-state protects the rights of 'minority nationalities' through mechanisms like guarantees against discrimination and regional autonomy schemes; in manifesting a fear of secessionist movements, it insists that national autonomous areas 'are integral parts of the People's Republic of China.' Acts which undermine the 'unity of the nationalities' are prohibited.[96] While religious freedom is recognised, this must be 'patriotic religion'[97] such that only 'normal religious activities' are protected, as opposed to activities which disrupt the public order.[98] Only 5 creeds (Buddhist, Taoist, Muslim, Catholic, and Protestant) are accepted in China, and these are subject to the scrutiny and control of the Chinese Community Party (CCP) which seeks to Sinicise religion and ensure its compliance with CCP objectives. President Xi Jinping, the CCP leader, has urged cadres to be 'unyielding Marxist atheists.'[99]

[88]Larry Catá Backer, 'The Rule of Law, the Chinese Community Party and Ideological Campaigns: *Sange Daibiao,* Socialist Rule of Law and Modern Chinese Constitutionalism' (2006) 16 Journal of Transnational Law and Contemporary Problems 101–174.

[89]Vietnam Constitution, art 65 (the state will 'develop to the full the People's patriotism and revolutionary heroism…').

[90]PRC Constitution, art 2.

[91]PRC Constitution, art 57.

[92]PRC Constitution, art 3.

[93]Vietnam Constitution, arts 8(2), 30.

[94]Vietnam Constitution, art 60(3).

[95]PRC Constitution, preamble; Vietnam Constitution, art 5 ('unified state of all nationalities').

[96]PRC Constitution, arts 4, 52.

[97]'Party Official hails Buddhist Sangha of Vietnam's national efforts' *Hanoi Times* (26 May 2015) <http://hanoitimes.vn/party-official-hails-buddhist-sangha-of-vietnams-national-efforts-15889.html> accessed 30 Aug 2021; Nguyen Khac Huy, 'Vietnamese law and policy on religion and belief' (Vietnam Law and Legal Forum, 29 Jun 2012) <https://vietnamlawmagazine.vn/vietnamese-law-and-policy-on-religion-and-belief-3491.html> accessed 13 Aug 2021.

[98]PRC Constitution, art 36.

[99]Charlie Campbell, 'China's Leader Xi Jinping reminds Party Members to be "Unyielding Marxist Atheists"' *Time* (25 Apr 2016) <https://time.com/4306179/china-religion-freedom-xi-jinping-muslim-christian-xinjiang-buddhist-tibet/> accessed 19 Aug 2021.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Within communist systems, the party is supreme, rather than the rule of law, although provisions in contemporary socialist constitutions declare the supremacy of the constitution and proclaim adherence to a socialist rule of law,[100] shifting away from the idea that law must serve the class struggle. CCP leader Xi stressed that 'No organisation or individual has the power to overstep the Constitution or the law.'[101] Nonetheless, the Constitution can be amended to consolidate the government's powers, such as the removal of presidential term limits in 2018.[102] This return to the 'days of Mao'[103] further diminishes the Constitution's ability to hold leaders accountable, by the concentration of power on one exalted individual, where 'Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era' was enshrined into the party constitution.[104] Adherence to constitutional values depends on internal self-restraint rather than external controls.

Elevating the rule of law to a constitutional norm is largely propelled by the shift towards a market economy, albeit with socialist characteristics,[105] a desire to attract foreign investment[106] and need to shore up the protection of commercial and property rights, though not necessarily civil-political rights. Although these constitutions establish courts, the final interpreter of the constitution is the Standing Committee of the National People's Congress[107] or National Assembly,[108] reducing the ability of judicial review to operate as a mechanism of accountability. The celebrated 'Marbury v Madison' status attributed to the 2001 Chinese decision of *Qu Yuling*[109] proved premature. The constitutional right to education under Article 46 was successfully invoked in litigation between two private parties. This opened up a potential trajectory for arguments that constitutional rights were justiciable, which would have altered prevailing understandings that there was no separation of powers, if courts could defend individual rights against state action. This path was shut down when the Supreme People's Court tersely declared in 2008 that its interpretation in that case no longer applied,[110] ending the prospect of judicialising the Constitution. Non-justiciable rights are akin to directive principles which guide state action, though no legal remedy is available in the event of a 'breach'.

Nonetheless, socialist states offer a different perspective beyond rights-oriented court-centric constitutionalism. While the Constitution may attribute power to the 'people's democratic dictatorship,'[111] these are not fully democratic polities: the Communist Party is usually the only one that exists, although independents in Vietnam may run as self-nominated candidates. The Vietnam

[100]Vietnam Constitution, art 119(1); PRC Constitution, art 5.

[101]'Xi stresses important role of Constitution' *Xinhuanet* (25 Feb 2018) <http://www.xinhuanet.com/english/2018-02/25/c_136998465.htm> accessed 13 Aug 2021.

[102]James Doubek, 'China removes presidential term limits, enabling Xi Jinping to rule indefinitely' (NPR, 11 Mar 2018) <https://www.npr.org/sections/thetwo-way/2018/03/11/592694991/china-removes-presidential-term-limits-enabling-xi-jinping-to-rule-indefinitely> accessed 19 Aug 2021.

[103]Jeremy Goldkorn, 'Don't talk about the constitution in China' (SupChina, 27 Feb 2018) <https://supchina.com/2018/02/27/dont-talk-about-the-constitution-in-china/> accessed 13 Aug 2021.

[104]'Inclusion of Xi's thought highlight of amendment to CPC Constitution' *Xinhuanet* (29 Oct 2017) <http://www.xinhuanet.com/english/2017-10/29/c_136713559.htm> accessed 13 Aug 2021; Eerishika Pankaj, 'Xi Jinping and Constitutional Revisions in China' (Focus Asia, Aug 2020) <https://isdp.eu/content/uploads/2020/08/Xi-Jinping-and-Constitutional-Revisions-in-China-FA-27.08.20.pdf> accessed 13 Aug 2021.

[105]Vietnam Constitution, arts 2(1), 51; PRC Constitution, arts 11, 15.

[106]PRC Constitution, art 18.

[107]PRC Constitution, arts 62, 67.

[108]Vietnam Constitution, art 74(2).

[109]Robert J Morris, 'China's Marbury: Qi Yuling v. Chen Xiaoqi – The Once and Future Trial of Both Education & Constitutionalization' (2010) 2 Tsinghua China Law Review 273. Notably, there have been lower court decisions which cited the constitution to enforce worker's labour rights: Ernest Caldwell, 'Horizontal Rights and Chinese Constitutionalism: Judicialization through Labor Disputes' (2012) 88 Chicago-Kent Law Review 63.

[110]Thomas Kellogg, 'Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China' (2009) 7 International Journal of Constitutional Law 215.

[111]PRC Constitution, art 1.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Constitution allows anyone over 21 to seek election to the legislative body, although the reality is that they need to make the cut for a pre-approved list. 870 candidates were approved to contest the 2016 elections for 500 seats, of which 108 were not from the Communist party; more than 100 independents were blocked from running on the basis of meeting certain demographic quotas. The Communist Party won 473 seats.[112] Critics suggested that some independents were allowed to run to give the semblance of a functioning democracy,[113] and that certain independents were actually Communist Party members.[114] Nonetheless, despite the lack of multi-party democracy, developments within the one party itself have secured some measure of inclusive democratic representation and a degree of accountability. In China in 2003, capitalists were invited to join the CCP as part of Jiang Zemin's theory of the 'Three represents,' which projected the CCP as being all inclusive in representing the 'advanced productive forces, the advanced culture and the interests of the broad masses.' This reflects an attempt to reconcile market-oriented views with Chinese socialism.[115]

Fruitful lines for constitutional inquiry, and for understanding how the state actually operates, open up if one looks beyond the constitutional text and courts, to examine constitutional practice and view the constitution as a 'living institution.' This would, as Xin argues,[116] first require taking seriously the fact that state organs, the military and congresses are all subject to the CCP. There is no separation of powers, such that the courts are led by the party in important cases, such as collective labour disputes,[117] but there is a division of labour. Hence, what should be interrogated is the relationship between the CCP and congresses, and between the central and provincial governments, by way of examining CCP documents, party-leader speeches and practices. This goes beyond the usual focus on legal limits to government powers through review mechanisms, dovetailing with the idea of political constitutionalism where public power is restrained principally through political methods and institutions; in countries like Britain, this resides in elections, ministerial responsibility, the ombudsman, parliamentary scrutiny and motions of no-confidence. Where political checks are effete, as they are in authoritarian or non-liberal one-party regimes like China, the effectiveness of political constitutionalism comes into question. Nonetheless, in examining political institutions, practices, discourse, conventions about proper political behaviour and in embracing a realist view of the importance of belief and behaviour in defining a constitution, we apprehend Karl Llewellyn's insight that the Constitution is less 'a matter of words or rules' but more 'a set of ways of living and doing', that is 'utterly extra-Documentary'; as a living institution, it is constituted by 'the actions, understandings and inter-relationships of those who operate it.'[118]

In examining the workings of intra-party democracy and intra party checks and balances,[119] scholars like Dowdle have argued the National People's Congress (NPC), which Article 57 of the

[112]'Vietnam – Quoc-Hoi National Assembly: Last Elections' (Inter-Parliamentary Union) <http://archive.ipu.org/parline-e/reports/2349_E.htm> accessed 13 Aug 2021.

[113]'How Vietnam's national elections run' (Tuoi Tre News, 21 May 2016) <https://tuoitrenews.vn/news/politics/20160521/how-vietnam's-national-elections-run/35695.html> accessed 13 Aug 2021.

[114]Matthew Clayfield, 'Vietnam's National Assembly elections plagued by biased vetting, intimidation' (ABC News, 20 May 2016) <https://www.abc.net.au/news/2016-05-20/vietnam-national-assembly-elections-plagued-by-bias/7430010> accessed 13 Aug 2021.

[115]John Welborn, 'A Capitalist Party in China?' (Ideas of Liberty, Mar 2003) <https://fee.org/media/4351/feat9.pdf> accessed 13 Aug 2021.

[116]Xin He, 'The party's leadership as a Living Constitution in China', in Tom Ginsburg & Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2013) 245–264; Baogang He, 'Socialist Constitutionalism in Contemporary China', in Michael Dowdle & Michael Wilkinson (eds), *Constitutionalism beyond Liberalism* (Cambridge University Press 2017).

[117]Xin (n 116).

[118]Karl Llewellyn, 'The Constitution as an Institution' (1934) 34 Columbia Law Review 1, 15, 17, 34.

[119]He Baogang, 'Intra-party democracy: A revisionist perspective from below', in Kjeld Erik Brodsgaard & Zheng Yongnian (eds), *The Chinese Communist Party in Reform* (1st edn, Routledge 2006).

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

PRC Constitution describes as the 'highest organ of state power,' has developed into an important constitutional actor, from initially being a marginal, politically irrelevant body. China's shift towards market reform rendered obsolete the old methods of political campaigning and advancing ideological propaganda. The Party retreated while the NPC took over legislative and institutional reform, enhancing its status. Article 71 empowers the NPC to discipline other state and public organs by conducting parliamentary investigations; the NPC's increasing importance over legislative activities beyond being a CCP rubber stamp is evident where it once forced changes to a CCP constitutional amendment draft.[120] Nonetheless, the NPC is still considered not to pose a serious challenge to the party's leadership, and will not realistically veto a bill they propose.

Although the Chinese bill of rights is not-justiciable, there is fertile ground to till in examining how the constitution is invoked to advance rights claims outside the courts – a form of popular constitutionalism. Although the CCP retains absolute leadership, this does not preclude initiatives to advance citizens' rights or prevent public wrongs, which the CCP in the final analysis decides how to respond to. For example, 'protest with Chinese characteristics' may get positive results, as was evident in the 2011 'Wukan uprising' where villagers protested against land thefts and corrupt local officials, receiving wide media coverage. This was not in the vein of an aggressive assertion of constitutional rights, such as the demands for political change motivating the Hong Kong umbrella revolution or the demands for liberal constitutional reform and authentic free speech articulated in Charter 8, which led to the imprisonment of its authors.[121] Instead, the Wukan villagers adopted the posture of a supplicant: directly appealing to Beijing for redress and condemning corrupt village officials, while legitimating CCP authority. The central government did respond when Wang Yang, a Party official, sent a team to investigate the uprising, found the villagers' demands reasonable, and took action which included freeing some protestors from jail and firing the village leader. The villagers then declared an end to the protest, which Wang lauded in a media quote calling for a 'Wukan approach' to reforming local governance.[122] Subsequently, two other villages specifically invoked Wukan as a 'precedent' of sorts, which represents socialist ideals 'of popular resistance, citizen engagement and local self-governing.' Wukan exemplifies how civil society can be involved in, while remaining separate from, the state organisational structure, where the Wukan villagers worked in unity with parliamentary representatives and local councillors in a consultative fashion, to solve a problem.

While liberalism focuses on rights and individual autonomy, the framing by protestors of their concerns in the form of collective economic justice rather than rights reflects the socialist focus on societal development and the state's duty to act fairly and respond to civil society. So too, when protestors from Anyuan in 2004 presented a petition to a mining company and its Communist Party committee asking to enjoy newly designated wage standards, they presented their concerns as being welfare based, rather than an assertion of political power; the company was informed that if this request was ignored, the protesters would seek official permission to organise a large scale protest 'in accordance with our constitutionally given rights.'[123] Rather than limits on state power, rights operate as 'state-authorised channels to enhance national unity and prosperity,' occasions for making petitions to influence public officials and to seek redress for wrongs.[124]

[120]Michael Dowdle, 'Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China' (2002) 35 New York University Journal of International Law & Politics 1, 3.

[121]Michael Bristow, 'Charter 08: A Call for change in China' (BBC News, 9 Dec 2010) <https://www.bbc.com/news/world-asia-pacific-11955763> accessed 19 Aug 2021.

[122]Daniel Vukovich, 'Illiberal China and global convergence: thinking through Wukan and Hong Kong' (2015) 36 Third World Quarterly 2130, 2136.

[123]Elizabeth J Perry, 'Chinese conception of "Rights" - From Mencius to Mao - and Now' (2008) 6 Perspectives on Politics 37, 47.

[124]ibid 46.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

Similar examples of popular constitutionalism, where citizens invoke constitutional rights outside the courts, have taken place in Vietnam. Citizens in Hanoi invoked the constitutional right to property to protest a police regulation permitting each citizen to only register one motorbike.[125]

These examples show a certain degree of grassroots societal constitutionalism[126] or populist constitutional consciousness, in invoking non-justiciable constitutional rights in an informal setting to elicit a desired result. In response to a form of agitation that does not threaten the Party or political stability, socialist constitutionalism enables the Party to take the opportunity to consolidate its legitimacy by showing it serves the people and involves civil society in the process, without making any power concessions.

Compared to past practice, there is certainly greater public deliberation and debate in relation to proposed constitutional reform in socialist countries, which is ultimately subject to state control, a form of 'deliberative authoritarianism.'[127] This may be stage-managed to give the appearance of (controlled) participatory democracy, or may flow, as Bui argues in Vietnam's case, from a people-based, elite activism. While China clamped down hard on the Charter 08 proposals and tends to speak in terms of a distinctive brand of Chinese socialist constitutionalism, Vietnam's constitutional debates are not premised on Vietnamese exceptionalism. Indeed, reformers within Vietnam advocate for liberal constitutionalism, including radical demands for a competitive political system and land ownership rights in 'Petition 72', which a group of senior scholars presented to the Constitutional Amendment Drafting Committee in 2013 when the constitution was being revised.[128] An examination of constitutional dialogue, as it takes place within and beyond the legislature, can yield rich insights into understandings of constitutionalism in these settings, more so than simply enquiring whether an Asian state has adopted Euro-American style judicial review.

Communitarian Constitutionalism

Within polities which practice communitarian constitutionalism, the state actively espouses a public conception of the good which underlies the national identity; it is expressly committed to promoting a certain vision of citizenship[129] and society in which the individual is rooted, not atomistic.

The integrative function of the constitution is prominent, where the constitution and cognate norms, which may be described as 'soft constitutional law', contribute to the process where citizens 'develop a communal spirit and a collective identity that differentiates them from other polities',[130] while seeking to optimally preserve spheres of individual and group autonomy. The community is not seen as 'monolithic' but as differentiated, composing various communities, such as minorities and indigenous groups, and constitutions may make special provision to protect their distinct identity and autonomy. These are reflected in group rights, underwritten by constitution or statute, which provide special protections to ethno-cultural minorities or indigenous peoples, such as the *dalits* and other scheduled castes and tribes in India.[131] Similarly, in Nepal, *dalits* have the right

[125]Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective* (Cambridge University Press 2008) 86.

[126]Gavin Anderson, 'Societal Constitutionalism, Social Movements and Constitutionalism from Below' (2013) 20 Indiana Journal of Global Legal Studies 881.

[127]Pip Nicholson, 'Vietnamese constitutionalism: The Reform Possibilities' (2016) 11 Asian Journal of Comparative Law 199, 204

[128]Bui Ngoc Son, 'Petition 72: The Struggle for Constitutional Reforms in Vietnam' (ICONnect Blog, 28 Mar 2013) <http://www.iconnectblog.com/2013/03/petition-72-the-struggle-for-constitutional-reforms-in-vietnam/> accessed 19 Aug 2021; Bui Ngoc Son & Pip Nicholson, 'Activism and popular constitutionalism in Contemporary Vietnam' (2016) 42 Law and Social Enquiry 677.

[129]Article 33 of the 2008 Myanmar Constitution makes it a duty for the Union to promote among the youth a patriotic spirit, correct way of thinking and to develop the five noble strengths.

[130]Dieter Grimm, 'Integration by Constitution' (2005) 3 International Journal of Constitutional Law 193.

[131]Constitution of India, arts 15, 16, 243-D, 243T 330, 332, 335, 338. See generally Joshua Castellino & Elvira D Redondo, *Minority Rights in Asia: A comparative legal analysis* (Oxford University Press 2006) 58–104.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

to participate in state agencies on the basis of proportional inclusion; they enjoy special rights to land, housing and health care.[132] Japanese courts have expansively construed individual rights to extend their application to indigenous groups such as the Ainu; this is significant in a society which has long affirmed the popular narrative that Japan was one of the most homogeneous societies in the world.[133] In *Kayano v Hokkaido Expropriation Committee*,[134] a case concerning the flooding of Ainu ancestral land by the Nibutani dam, the Sapporo District Court applied the Article 13 individual right to 'life, liberty and the pursuit of happiness' to the Ainu, referring to the minority rights provision in Article 27 of the Covenant on Civil and Political Rights to affirm the need to respect differences between individuals and to protect distinctive minority cultures. Although the formal recognition of the Ainu by a Diet resolution in 2008 is a progressive step, which introduces the idea of ethnic diversity into the conception of the character of the Japanese community and polity, subsequent legislation is seen to have fallen short in focusing on the preservation of traditional culture and not recognising political or land rights. This renders the Ainu 'wards'[135] rather than empowered citizens, kept at the margins of society.[136]

Communitarian constitutionalism is manifested in 'thick' constitutional prescriptions of the good citizen and the common good, found in directive principles such as in the Indian and Philippines constitutions, and lists of duties which are hortatory rather than obligatory, but which form the matrix for social expectations. The Bhutan constitution exemplifies this. Article 5(3) promotes environmental conservation by requiring that 60 per cent of Bhutan's land must be under forest cover for all time; Article 18(1) exhorts the opposition party to play a 'constructive role' to help promote good governance. Article 15(2)(3) states that political parties are not to 'resort to regionalism, ethnicity and religion' to gain votes and must promote 'national unity' and 'progressive economic development.' Citizens owe 'good samaritan' fundamental duties, such as assisting accident and natural disaster victims 'to the greatest possible extent' and to 'take necessary steps' to prevent acts of torture or abuse of women and children under Articles 8(5) and (6). This operates against the backdrop of Bhutan's identification as a democratic constitutional monarchy (Article 1 (2)) with a parliamentary system, with two term limits for the Prime Minister (Article 17(2)). The *Druk Gyalpo* (King) assents to bills but also has non-ceremonial powers such as the discretion to refuse assent and return the bill with objections for renewed parliamentary deliberation (Article 13(10)), and to call for national referendums to vote on a bill of national importance which is not passed in a joint sitting of Parliament (Article 34). Article 3(1) provides that Bhutan's Buddhist spiritual heritage promotes 'peace, non-violence, compassion and tolerance' and obliges the state to create conditions ensuring the 'sustainable development of a good and compassionate society rooted in Buddhist ethos and universal human values' (Article 9(20)). The particularities of

[132]2015 Constitution of Nepal, art 40.

[133]John Burgess, 'Japanese proud of their homogeneous society' *The Washington Post* (28 Sep 1986) <https://www.washingtonpost.com/archive/politics/1986/09/28/japanese-proud-of-their-homogeneous-society/629281b9-3357-4169-80ba-eb5d031f1c31/> accessed 13 Aug 2021. The Shizuoka District Court noted in the *Bortz v Suzuki* judgment of 12 October 1999 that because Japan was 'a country set off by oceans, a homogenous society was formed. At the same time, a childish aspect remained, making exchange with foreigners difficult for both sides'. Timothy Webster, 'Translation: Bortz v Suzuki, Judgement of Oct 12, 1999, Hamamatsu Branch, Shizuoka District Court' (2007) 16 Pacific Rim Law & Policy Journal 631, 657. See Dharitri C Narzary, 'The Myths of Japanese "Homogeneity"' (2004) 40 China Report 311.

[134]Judgment of the Sapporo District Court, Civil Division No 3 (issued 27 Mar 1997), 1598 Hanrei Jihō 633; 938 Hanrei Times 75, reprinted (1999) 38 ILM 394.

[135]Komori Yoichi, Helen JS Lee & Michele Mason, 'Rule in the Name of Protection: The Japanese State, the Ainu and the Vocabulary of Colonialism' (2013) 11 The Asia Pacific Journal 1.

[136]Higashimura Takeshi, 'No Rights, no regret: New Ainu legislation short on substance' (Nippon.com, 26 Apr 2019) <https://www.nippon.com/en/in-depth/d00479/no-rights-no-regret-new-ainu-legislation-short-on-substance.html> accessed 19 Aug 2021; 'Ainu lawsuit over fishing rights test case for much larger issues' *The Asahi Shimbun* (18 August 2020); Yuko Osakada, 'An examination of arguments over the Ainu Policy Promotion Act of Japan based on the UN Declaration on the Rights of Indigenous Peoples' (2021) 25 International Journal of Human Rights 1053.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

national identity are evident in idiosyncratic provisions related to the state duty to promote 'Gross National Happiness' (Article 9(2)), which is being operationalised through constructing a GNH index and establishing a GNH Commission chaired by the Prime Minister to integrate GNH principles in all policies and plans.

In adjudicating rights, communitarian review[137] as an interpretive method does not treat rights as trumps, but adopts a more holistic approach in considering competing rights, duties and the common good. Where the offence of sedition is concerned, which is expansively defined in the Singapore *Sedition Act*[138] as 'a tendency to produce feelings of ill-will and enmity between different races or classes of the population of Singapore,' the courts have balanced the constitutional right to speak against another's 'freedom from offence', the harm caused to one racial group as well as to 'the very fabric of our society.'[139] So too, the social imperative of curbing drug-trafficking through entrapment initiatives justifies restricting the due process, equality or privacy rights of drug traffickers.[140] This must be distinguished from statist approaches towards judicial review where no genuine community interest in served beyond considerations of administrative efficiency. Strict Singapore drug-trafficking laws, involving capital and corporal punishment, enjoy wide popular support.

This communitarian ethos is reflected in the framing of rights clauses, which are not cast in absolute terms, such as the American First Amendment. The Malaysian and Singaporean free speech guarantee states the permissibility of express limitation before the right itself is declared.[141] The derogation clause contains eight exhaustive grounds which Parliament may invoke should it deem 'necessary or expedient.' The original incarnation of Malaysia's Article 10 (which Singapore imported) allowed Parliament to enact 'reasonable' restrictions on free speech but the term 'reasonable' was omitted from the final formulation to prevent challenges against legislation on grounds of reasonableness, confiding faith in Parliament by recognising it had the primary role in determining what reasonableness requires in the circumstances.[142] This underscores the centrality of political constitutionalism, of faith in the moderation, sensibilities and self-restraint of parliamentary representatives who are removable by ballot box.

Communitarian considerations are also evident in the deliberate exclusion of certain rights from the Constitution, such as the right to property. The Singapore *Land Acquisition Act* provides for compulsory acquisition of land, with Parliament determining the principles of compensation, below market rate, where land was acquired for public purposes pursuant to national, developmentalist objectives. This was justified as placing 'communitarian interests over those of the individual' after Singapore broke from the English doctrine that individual rights were the 'paramount consideration', in favour of the 'customs and values of Singapore society.'[143]

The Singapore government in their 1991 'Shared Values' white paper[144] distinguished between Asian and Western values on the basis that 'Asian societies emphasise the interests of the

[137]See eg, Thio Li-ann, 'Principled Pragmatism and the 'Third Wave' of Communitarian Judicial Review in Singapore', in Jaclyn L Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge 2016) 75–116.

[138]Sedition Act (Cap 290, Rev Ed 2013), s 3(2)(d).

[139]*Public Prosecutor v Benjamin Koh Song Huat* [2005] SGDC 272 para 8.

[140]*Mohamed Emran bin Mohamed Ali v Public Prosecutor* [2008] 4 SLR(R) 411.

[141]Federal Constitution of Malaysia, art 10; Constitution of the Republic of Singapore, art 14. These read 'Subject to clause (2), every citizen has the right to freedom of speech and expression.'

[142]Federation of Malaya Constitutional Commission 1956-1957 Report, para 13(ii) (Justice Abdul Hamid, Note of Dissent). However, the Malaysian Federal Court have implied in reasonableness to qualify limits on Article 10 rights in *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333. Singapore courts also appear to be reading in reasonableness requirements where Part IV liberties are constrained: *Vijaya Kumar v AG* [2015] SGHC 244; *Wham Kwok Han Jolovan v PP* [2020] SGCA 111.

[143]Prime Minister Lee Kuan Yew, 'Proceedings at the Opening of the Singapore Academy of Law' [1990] 2 Singapore Academy of Law Journal 155, 155–156.

[144]Parliament of Singapore, White Paper on Shared Values (Cmd 1 of 1991).

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

community, while Western societies stress the rights of the individual.'[145] Part of the Asian values school that Singapore was a leading proponent of in the 1990s was the trade-off theory: in the early stages of development, the political stability needed for economic development justified restrictions on civil-political rights, where social discipline was preferred over rambunctious democracies. The Constitution was an instrumental tool to secure development and nation-building objectives.

As Singapore's GDP grew from US$500 to US$50,000 between 1965 and 2011,[146] the political culture shifted from one where citizens were expected to address governors as social superiors, to a post-deferential, post-feudal mentality where governors were expected to be public servants, responsive to citizens;[147] top-down *diktats* of the soft authoritarian era were replaced by active, more inclusive consultation and engagement with citizens and civil society, to persuade citizens of the merits of policies or to placate the aggrieved by hearing their grievances. This reflects a form of 'paternal democracy', distinct from a 'Father knows best' paternalism. 'Paternal' is a relational term; a parent's relationship with a child changes over time; with a wealthier, more literate society, adjustments to the political system to cater to greater demands for political accountability and participation are needed to manage political change. Nonetheless, the government stresses the importance of staying 'united on the big issues' despite the growing diversity of voices, and to avoid confrontational politics and the agonistic social relations this engenders. This reflects the shared values listed in the 1991 white paper, of placing 'Nation above community and society above self' and preferring 'consensus instead of contention.' Now, consensus must be genuine, not declared by elite fiat, but attained through rigorous, robust debate, 'issue focused, based on facts and logics and not just on assertions and emotions' in order to 'reach correct conclusions' on what best serves the country.[148]

The 1991 White Paper is an example of 'soft constitutional law' (SCL);[149] while not legally binding, SCL norms have a legal impact and shape the constitutional culture and conduct of constitutional actors. SCL as standards are not conventions which are unwritten principles of political morality arising unconsciously out of past practice. SCL norms are declaratory, forward-looking in nature; they may be found in resolutions, declarations, white papers; unlike mere policy statements, SCL norms are a product of conscious deliberation, articulated with some authority by political leaders whose words carry considerable weight within a dominant-party setting. They are written down and accessible to concerned stakeholders, and as such, may nurture understandings of appropriate standards of conduct, generating both aspirations and expectations. In the US and UK, SCL norms are primarily directed at shaping institutional interactions. A non-binding congressional resolution may informally 'signal' to the President policy preferences, which may be factored into executive decision-making.[150] In the UK, SCL norms are found in documents such as devolution concordats, or agreements between the central government and devolved legislatures and administrations, setting out principles which govern their relations as in a non-binding 2013 Memorandum of Understanding.[151] This is similar to a non-binding Singapore white paper which sets how the elected presidency is to relate to the parliamentary executive, to sustain a 'harmonious working relationship' between both in the process of operationalising a regime of fiscal

[145]ibid para 24.

[146]K Shanmugam, 'The Rule of Law in Singapore' [2012] Singapore Journal of Legal Studies 357, 358.

[147]Thio Li-ann, 'Between Apology and Apogee, Autochthony: The "Rule of Law" beyond the Rules of Law in Singapore' [2012] Singapore Journal of Legal Studies 269, 284–287.

[148]Deputy Prime Minister Lee Hsien Loong, 'Building a Civic Society' (Speech at the Harvard Club of Singapore, 6 Jan 2004).

[149]Li-ann Thio, Soft Constitutional Law in non-liberal Asian Constitutional Democracies' (2010) 8 International Journal of Constitutional Law 766.

[150]Jacob Gersen & Eric Posner, 'Soft Law: Lessons from Congressional Practice' (2008) 61 Stanford Law Review 573.

[151]Aileen McHarg, 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law' (2008) 71 Modern Law Review 853.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

constitutionalism. These principles were expected to evolve over time and would bind future Presidents and Governments unless they mutually or unilaterally decided to depart from them. Thus, the White Paper sets out the framework for conducting institutional relationships, until further notice.[152] In China, soft law is seen to provide flexible, detailed guidelines for public governance.[153]

In Asian jurisdictions, SCL norms play a distinctive role shaping state-citizens relations, as a source of 'fundamental norms' setting out basic values which constitute national identity. This is akin to a non-liberal version of Habermas' idea of constitutional patriotism, where national solidarity is constructed not on the basis of a shared past, ethnicity, culture or faith, but a common future based on certain social-political ideals. This of course requires apprehending the constitution as something beyond the text and judicial review. Malaysia's Rukunegara Declaration of 1971, which was itself inspired by Indonesia's *Pancasila*,[154] both declarations of national policy, may be considered SCL. These contain principles[155] designed to supplement the constitutional text, such as the call for a 'just society' which is used in Malaysia to justify affirmative action and privileges under the National Economy Policy for the majority Malay race as 'sons of the soil.' Other Rukunegara principles have been judicially cited not to formulate legal arguments but to underscore principles, such as 'Belief in God', supporting the influence of religious beliefs on public policy.[156]

In Singapore, key fundamental governance principles or SCL norms in White Papers and declarations reflect the executive's determination of what the constitution means. These norms have some normative effect, and may be seen to be reflected in judicial practice as well as in the government management of social relations. For example, paragraph 43 of the Shared Values White Paper proposes the neo-Confucian ideal that one should consider governors to be honourable men or junzi (君子) whom the population trusts and respects, rather than the 'Western idea' that governors should be treated with suspicion unless proven otherwise, and be given as limited powers as possible.

Although this white paper has never specifically been judicially invoked, the idea of governors as honourable is reflected in three things, showing the influence of this SCL norm. First, in the operating presumption of constitutionality or legality in cases involving alleged abuses of power or rights infringement.[157] Second, in the 'green light' approach towards judicial review based on the co-equality of the three government branches under the separation of powers scheme. Under this approach, public administration is not viewed as a necessary evil; courts are not the first line of recourse in controlling power abuse, which 'should come internally from Parliament and the Executive itself in upholding high standards of public administration.' Rather than seek judicial redress, good government should first be sought 'through the political process and public avenues', allowing courts to play a supporting role by promoting conformity to the rule of law in articulating

[152]Parliament of Singapore, The Principles for Determining and Safeguard the Accumulated Reserves of the Government and the Fifth Schedule Statutory Boards and Government Companies (Cmd 5 of 1999).

[153]Eugene Clark, 'China's soft law a major factor for success in future' (China.org.cn, 17 Oct 2013) <http://www.china.org.cn/opinion/2013-10/17/content_30321578.htm> accessed 13 Aug 2021; Zhai Xiao-bo, 'Soft Law and Public Governance' (2007) Science of Law <https://oversea.cnki.net/kcms/detail/detail.aspx?filename=DOUB200702001&dbcode=CJFQ&dbname=cjfd2007&v=> accessed 13 Aug 2021.

[154]Nadirsyah Hosen, 'Religion and the Indonesian Constitution: A Recent Debate' (2005) 36 Journal of Southeast Asian Studies 419.

[155]These are: (i) Belief in God, (ii) Loyalty to King and Country; (iii) Upholding the Constitution; (iv) Rule of Law and (v) Good Behaviour and Morality. Reproduced as an annex to Andrew Harding, 'The Rukunegara Amendments of 1971', in Andrew Harding & HP Lee (eds), *Constitutional Landmarks in Malaysia* (Lexis Nexis 2007) 115, 130–133.

[156]*Ritz Hotel Casino Ltd v Datuk Seri Osu Haji Sukam* [2005] 6 MLJ 760 para 10.

[157]See *Yong Vui Kong v AG* [2011] 2 SLR 1189 para 139. Here, the Court of Appeal affirmed the starting position was that all things are presumed to be done in due form (*omnia praesumuntur rite esse acte*). However, this was only a starting point as a presumption cannot determine an issue: *Saravanan Chandaram v PP* [2020] SGCA 43 para 154.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

clear rules for the government to follow. [158] This evinces a greater trust in the political branches than one finds in WLC and perhaps accounts for the fact that the Singapore Supreme Court has yet to exercise its acknowledged power to strike down a law as unconstitutional. Third, in political libel cases, the courts accord higher quantum of damages to government officials than ordinary citizens because of the importance of their reputation, as a man wishing to persuade others would seek 'to establish a most honourable name among his fellow-citizens.' Although the High Court quoted from the writings of the Greek rhetorician Isocrates, this resonates with the Confucian idea of governors as honourable gentlemen to be presumptively trusted, rather than knaves to be feared.[159]

SCL norms are key to fostering the brand of relational constitutionalism extant in ethnically and religiously diverse countries like Singapore, where the goal is not just to maintain public order, but 'racial and religious harmony'. This transcends an absence of civil disorder, speaking to a quality of relational well-being and solidarity between distinct religious and ethnic communities, a vision of community going beyond bare co-existence; it points to the spiritual, social resilience that buttresses national identity and promotes sustainable democracy with citizens committed towards the common good, while maintaining their differences with civility.

In Singapore, 'racial and religious harmony' as a hortatory SCL norm and quasi-constitutional principle is contained in the 1989 'Maintenance of Religious Harmony' White Paper (MRHWP)[160] and underscored in the 1991 White Paper on Shared Values. The MRHWP sets out what it terms 'ground rules of prudence and good conduct,' relating to how religious leaders and citizens should participate in political debate and how religious groups should relate with each other in service of the overriding objective of religious harmony. In particular, religious groups are urged to respect the right of individuals to have, not to have or to change religious beliefs. This operates within the framework of the Article 15(1) constitutional guarantee of every person's right to 'profess, practice and propagate' their religion, subject to Article 15(4) limits in the interests of public order, health and morality. The MRHWP indicates when the exercise of the right of religious propagation may be abused, in the case of aggressive proselytisation where a religious group 'seeks to increase the number of its converts drastically'[161] to establish a dominant position, causing disquiet among other groups. All SCL norms conform to the constitutional vision of religious freedom where religious identity is voluntarist; the right to profess and propagate faith is symbiotic in helping individuals make informed religious choices. Nonetheless, through SCL norms, the executive interprets the content of the right, by insisting that this constitutional liberty be 'exercised very sensitively', in a manner which does not denigrate another's religion or promote inter-religious alienation. The government has specifically 'discouraged' Christian groups from 'aggressively evangelizing' Malay Muslims in Singapore,[162] as 'the potential for giving offence is great.' Even without direct engagement, the government sees harm in fiery sermons (particularly in the internet age) where preachers denounce other faiths as 'misguided infidels and lost souls', causing 'great umbrage to entire communities.'[163]

In instances where such an inter-religious crisis has emerged, a certain protocol or public ritual seems to be followed. Typically, an online sermon, for example uploaded by a church, offends another religious group, such as the Buddhists or Taoists. In response to complaints or publicly expressed concerns, the government may intervene in a relatively low-key fashion by issuing a 'warning' to preachers; however, social disquiet is fuelled by mainstream or social media. The offending preacher visits the offended religionists to apologise, and the forgiveness extended

[158]Chan Sek Keong CJ, 'Judicial Review - From Angst to Empathy' (2010) 22 Singapore Academy of Law Journal 469 para 29.

[159]*Lee Hsien Loong v Singapore Democratic Party* [2009] 1 SLR (R) 642 para 102 (Belinda Ang J).

[160]Cmd 21 of 1989.

[161]ibid para 17.

[162]ibid para 15.

[163]ibid para 16.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

by the offended is publicised. Then only does a government minister issue a statement directly addressing the incident which signals approval of the respective parties' conduct. The minister affirms the liberty of propagation but underscores the need not to insult others' religious beliefs or stir inter-group tensions.[164] The SCL norms in the MRHWP are invoked as a normative reference point to socialise actors into accepting that certain forms of behaviour when exercising fundamental liberties are expected. Involving religious leaders in the processes led by a government minister to draft a 'Declaration on Religious Harmony' also underscores these SCL norms as a shared good, and builds relational trust.

To be sure, these SCL norms operate against a legal framework which empowers the government to impose 'hard' legal sanctions by issuing restraining orders to gag preachers or through prosecuting religious offences. Nonetheless, informal regulation is a better fit to cultivating social trust, through invoking known hortatory soft norms, emphasising social expectations and reconciliation rituals, sealed by governmental approval. A 2010 conflict between a church deacon and Taoist leader was resolved and publicly demonstrated through a joint singing concert which the Prime Minister attended. This same duo performed again in 2015 at an inter-faith concert, with the Prime Minister as guest-of-honour.[165] Optics are important in this reconciliation ritual designed to restore harmonious equilibrium. In 2017, an Imam's sermon calling for God to 'grant us victory over Jews and Christians' was posted online, causing a stir. The Imam was prosecuted under Section 298A(b) of the Penal Code and fined S$4000. Members of the private inter-faith Inter-Religious Organisation (IRO) visibly attended his trial to provide moral support. Accompanied by IRO members, some dressed in religious attire, the Imam publicly apologised to various religious leaders, including an Anglican Bishop and the Chief Rabbi. This received media publicity, demonstrating rapprochement. The media reported that the Law Minister met with the Imam over breakfast, expressing his appreciation for the Imam's remorseful and sincere apologies, before his Ministry announced his deportation back to India. Photos of the Minister breaking bread with the Imam and hugging him[166] were also published. The incident was capped by a Facebook post by the Muslim Affairs minister who thanked 'our non-Muslim friends for accepting the apology', noting that gracious forgiveness reflected 'the Singapore way' of upholding 'mutual respect and harmony for our common good.'[167]

By underscoring the importance of the constitutional value of racial and religious harmony in practice, with apology and forgiveness as aspiration and expectation, the government seeks to partner with community leaders to manage disputes, rather than to automatically invoke legal sanctions. SCL and practice thus provides a template for how these sorts of religious disputes are to be approached, beyond the courts, as public judicial hearings can exacerbate 'us' versus 'them' relations, distinct from a reciprocal commitment to restore the equilibrium of social harmony through dialogue and 'quiet diplomacy,' the methods of relational constitutionalism.

Conclusion

To apprehend the concept of constitutionalism more fully, comparative work needs to engage with constitutional experiences on a global scale. This must transcend a vision of constitutionalism which

[164]Li-ann Thio, 'Irreducible plurality, indivisible unity: Singapore Relational Constitutionalism and cultivating harmony through constructing a constitutional civil religion' (2019) 16 German Law Journal 171.

[165]'Song of Friendship' *Straits Times* (4 Dec 2010); 'Inter-faith concert gets strong show of support' *Straits Times* (7 Jul 2015).

[166]Toh Yong Chuan, 'Shanmugam appreciates imam's sincere apology' *Straits Times* (6 Apr 2017) <https://www.straitstimes.com/singapore/shanmugam-appreciates-imams-sincere-apology> accessed 13 Aug 2021; '"Imam has shown sincere remorse, regret," Shanmugam' *Today* (5 Apr 2017) <https://www.todayonline.com/singapore/shanmugam-meets-imam-who-made-offensive-remarks-against-jews-christians> accessed 13 Aug 2021.

[167]'Imam who made offensive remarks to be repatriated' *Today* (3 Apr 2017) <https://www.todayonline.com/singapore/imam-who-made-offensive-remarks-be-repatriated-stern-warnings-two-others-mha> accessed 13 Aug 2021.

https://doi.org/10.1017/asjcl.2021.23 Published online by Cambridge University Press

focuses on constitutions as rules-based texts and the work of courts of leading liberal democracies, to the neglect of other sites of constitutional practice and governance. To do so, a third space must be found without collapsing anti-constitutionalist, illiberal despotism with no objective limits on power into the sphere of constitutionalism, and without equating judicial review with constitutionalism. Pluralising the idea of constitutionalism will require movement away from the view that constitutionalism conceptually is 'a liberal ideology, a political program and a normative concept,'[168] and that all illiberal regimes which limit democracy, extend government power, restrict individual rights and practice the rule by law fall beyond the pale of constitutionalist enquiry.

Devoting attention to the diverse and rich constitutional experience in Asia through in-depth studies go some way to serving the pluralisation project. Not only will there be points of convergence with WLC practice in the form of sophisticated case law and robust rights protection, scholars will have to engage with the constitution beyond the court, intra party democracy, soft constitutional law, how religion relates with constitutional secularism beyond ideas of separationism, political and popular constitutionalism, how constitutions are used or misused, and how they direct and constrain behaviour within regimes espousing non-liberal or mixed philosophies. This will in turn enrich constitutional theory about normatively desirable and defensible forms of constitutionalism which have 'mixed' liberal and non-liberal elements in varying proportions, the concept of the constitution itself, and how constitutions work within their cultural contexts to address common problems such as securing legitimate and accountable rule.

The challenge ahead is to transcend the hubris of liberal prescriptivism without forsaking the aspiration to better understand universal principles of justice and their transferability. For a start, this will require engaging with the extant varieties of constitutionalism, which will inform 'imaginary conversations that accord equal discursive dignity to all constitutional discourses.'[169]

[168]Konrad Lachmayer, 'Constitutional authoritarianism, not authoritarian constitutionalism!' (Völkerrechtsblog, 31 Aug 2017) <https://voelkerrechtsblog.org/constitutional-authoritarianism-not-authoritarian-constitutionalism/> accessed 13 Aug 2021.

[169]Upendra Baxi, 'Constitutionalism as a Site of State Formative Practices' (2000) 21 Cardozo Law Review 1183, 1210.

Cite this article: Thio Li-ann (2021). Varieties of Constitutionalism in Asia. *Asian Journal of Comparative Law* **16**, 285–310. https://doi.org/10.1017/asjcl.2021.23