This article traces the pathways of constitutional development in five major Asian nations—India, China, Korea, Japan, and Indonesia. It considers whether constitutionalism in its Western form may be regarded as having universal appeal and application far beyond the Western nations in which it originated, and whether it may be argued that there exists a distinctly Asian form of constitutionalism or of political-constitutional practices. Adopting a macrohistorical and comparative perspective on developments in these five nations, from the late nineteenth century up to the present, the article demonstrates that constitutionalism has significantly broadened and deepened its reach in Asia in modern and contemporary times. It also suggests that no distinctly Asian mode of constitutionalism or of political-constitutional practices can be identified. Nor is there evidence that Asian culture and values are particularly resistant to constitutionalism. On the contrary, there is evidence that whether constitutionalism eventually triumphs in a particular jurisdiction is determined more by politics and the contingency of historical events, such as wars and foreign interventions, than by culture and values.

1. Introduction

Constitutionalism as a school of thought and as a set of political and legal practices—including elements such as the rule of law, the separation of powers, political checks and balances, civil liberties, a written constitution, review of the constitutionality of governmental actions, and the peaceful transfer of political power in accordance with
constitutional norms\textsuperscript{1}—was originally a product of modern Western civilization. In the course of the last two centuries, it has spread to all corners of the earth. This article examines and reflects on the origins and development of constitutionalism and political-constitutional practices in Asia, focusing on several case studies from South Asia, East Asia, and Southeast Asia—India, China, Korea, Japan, and Indonesia. It traces the paths of constitutional development in the countries concerned. It considers whether constitutionalism, in the form in which it has evolved in the West, may be regarded as having universal appeal and application beyond the Western nations in which it originated, and whether it may be argued that there exists a distinctly Asian form of constitutionalism or political-constitutional practices, just as it has been argued that there are specifically Asian values that are relevant to human rights in Asia.

The transplantation of Western ideas and practices of constitutionalism to Asia occurred, in some cases, in the course of colonization (as in the case of India, for example), and in others by voluntary and conscious importation or imitation as an Asian society sought to modernize itself when confronted by the challenges posed by the West (for example, in China and Japan). In some cases, constitutions that were liberal democratic in orientation were introduced when the Asian nation first became an independent state; however, authoritarian rule was subsequently practiced in disregard of the requirements of constitutionalism (South Korea and Indonesia are instances). Such authoritarianism, however, did not last and eventually gave way to liberal constitutional democracy (South Korea, Taiwan, and Indonesia). In some situations, Western ideas and institutions of constitutionalism were successfully integrated with the local culture and local circumstances and resulted in stable forms of rule (India and postwar Japan). In still other countries, constitutions of the Leninist-Stalinist form, once introduced, proved resilient, and rule by a communist party that monopolizes power still endures in the early twenty-first century (as in China and North Korea).

This article rests on five case studies of constitutional development in these Asian countries. After presenting the five studies, the concluding section of this article compares and contrasts the different experiences of the countries’ constitutional histories and provides an assessment of the extent to which constitutionalism has triumphed, putatively, in the Asian countries concerned, and whether specifically Asian versions of constitutionalism or political-constitutional practices exist.

Before we proceed, it would be appropriate to explain at the outset the selection of the countries for the purpose of these studies. The countries selected are China (including the Republic of China on Taiwan), Japan, Korea (including North and South Korea), Indonesia and India. They are selected both because they represent different

\textsuperscript{1} As Nino points out, the word “constitutionalism” “has a range of meanings that vary in their conceptual thickness”: \textsc{Carlos Santiago Nino}, \textit{The Constitution of Deliberative Democracy} 3 (1996). He suggests (id., 3–4) that these meanings include the rule of law (government being conducted according to legal rules); the constitution being a higher law; the law having certain characteristics such as being general, precise, public, nonretroactive, and impartially applied; the separation of powers and judicial independence; the protection of individual rights; judicial review; and democracy.
strands of Asian traditions and cultures, different trajectories of Asian modernity, and different levels of economic development, and because of their cultural, economic, or political importance or influence in Asia (excluding the Middle East). For example, China is the most populous nation in the world and a rising economic superpower. Japan is the most advanced country in Asia economically and technologically. India and Indonesia, by virtue of the size of their territory, population, and economy, may be considered *primus inter pares* for South Asia and Southeast Asia, respectively. Last but not least, the case of Korea is significant as a divided nation in which South Korea has risen from poverty and the devastation of the Korean War to become an economic and cultural giant in Asia.

2. **The case of Japan**

Europeans, including Christian missionaries, first came to Japan in the sixteenth century but were driven away in the seventeenth century; the remaining local Christian converts were persecuted. Thereafter, Japan under the Tokugawa Shogunate (1603–1868) adopted a policy of isolation from the rest of the world, until she was forced to open her doors soon after the American Commodore Perry arrived in 1853 at Tokyo Bay with his fleet. As with her neighbor China, the Western powers imposed the “unequal treaty system” on Japan, and, like the Chinese, the Japanese began to seek effective means of defense against the West while, at the same time, building a “rich country” and a “strong military” that could stand up to the West.

Although Japan had an emperor (*tennō*) who inherited the throne in an unbroken line of hereditary succession from time immemorial and without the cycle of dynastic change that occurred in many other countries, political power in the Tokugawa period was in the hands of the shogun. This figure was a military ruler who acted as the regent, and whose own position was hereditary, with Tokugawa Ieyasu being the founder of the shogunate; his government was known as the *bakufu*. Japan was divided into more than two hundred feudal domains, each with its own feudal lord or *daimyo*. The shogun exercised supervision and control over the feudal lords. The challenge posed by the West precipitated the fall of the Tokugawa shogunate and the Meiji Restoration of 1868. The feudal system was soon replaced by a more centralized rule. The Meiji Restoration was, in theory, the restoration of the emperor’s power, or, rather, the shogun’s handing back power to the emperor. As a matter of political reality, the recipients of the transferred power were a new political elite who acted in the emperor’s name, consisting mainly of political leaders from the feudal domains of Satsuma and Choshu. This oligarchy became known as the *genro*, or elder statesmen.

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4 *Id.* at 238.
5 *Id.* at 80.
6 *Id.* at 88.
Under the leadership of the government of the Meiji emperor (1868–1912), Japan underwent very rapid modernization and Westernization in economic, technological, social, cultural, political, and legal domains. “No other country responded quickly and successfully to the challenge of superior Western economic and military technology.”7 In the legal domain, for example, European-style codes of law (modeled primarily on French and German codes) were enacted, and European-looking courts of law, along with a legal profession and legal education, were established.8 Notions of Rechtsstaat (the rule of law) and judicial independence were introduced and accepted as legitimate.9 The government administrative system was also Westernized.10

From the perspective of constitutionalism, one of the most significant developments was the rise of a movement for freedom and people’s rights in the 1870s, and a related movement campaigning for the establishment of a British-type parliamentary system in Japan.11 In 1875, the government promised that by 1890, a constitution would be enacted and a parliament established.12 In preparation for this constitution-making exercise, the statesman Hirobumi Itoh was sent to Europe to study the constitutional systems there.13 It was decided, ultimately, that the European model of constitutional monarchy, particularly the Prussian constitution of 1850,14 was the most suitable one for Japan to emulate, although different political groups and individuals had produced proposals for draft constitutions with varying contents. In 1889, the constitution of the empire of Japan (the Meiji constitution) was finally promulgated by the emperor.

The enactment of the Meiji constitution was presented as an act of the emperor’s rather than that of the people, and the Western notion of popular sovereignty was not adopted. The constitutional text was preceded by an “Imperial Oath” in which the emperor pledged “never at this time nor in the future to fail to be an example to Our subjects in the observance of the Laws hereby established.” The oath was followed by the “Imperial Rescript on the Promulgation of the Constitution,” by which the emperor promulgated “the present immutable fundamental law, for the sake of Our present subjects and their descendants.” The preamble of the constitution stated, inter alia: “The right of sovereignty of the State, We [i.e. the emperor] have inherited from Our Ancestors, and We shall bequeath them to Our descendants.” The text of the constitution declared that “[t]he Emperor is sacred and inviolable”15 and “is the head of the Empire, combining in Himself the rights of sovereignty.”16

7 Id. at 84–85.
9 Id. at 35; Noriho Urabe, Rule of Law and Due Process: A Comparative View of the United States and Japan, in JAPANESE CONSTITUTIONAL LAW 173–186 (Percy R. Lane, Jr. and Kazuyuki Takahashi eds., 1993).
10 Reischauer, supra note 3, at 83, 88.
11 Id. at 87–88; Oda, supra note 8, at 27.
12 Oda, supra note 8, at 28.
13 Id. at 28; Reischauer, supra note 3, at 88.
14 Oda, supra note 8, at 28.
16 Article 4.
At the same time that it vested state sovereignty in the emperor, the Meiji constitution (in its chapter 3) provided for a parliament known as the Imperial Diet, which included the House of Peers (the upper house), consisting of nobles and appointed members, and the House of Representatives (the lower house), elected by the people in accordance with the electoral law. The constitution also set out, in chapter 2 (following the first chapter, on the emperor), the rights and duties of subjects. There were separate chapters on the ministers and the Privy Council (chapter 4), the Judicature (chapter 5), finance (chapter 6), and supplementary rules (chapter 7).

Initially, the franchise for the House of Representatives was limited to male citizens who paid at least 15 yen in tax and who comprised only 1 percent of the population. The franchise was extended in 1900 and, again, in 1919, and in 1925 it was broadened to become universal male suffrage. Candidates from different political parties competed in the elections, and, when elected to the Diet, they struggled against the executive for a greater share of power. The practice gradually evolved that cabinet ministers, including the prime minister, were appointed from among politicians of the leading parties in the House of Representatives. The Diet thus “turned out to be the first successful parliamentary experiment outside the West.” Such democracy flourished during the reign of the Taisho emperor (1912–1926) who succeeded the Meiji emperor; it was known as the Taisho democracy (1913–1932). The democratic trend, however, was reversed in the 1930s.

It should be noted that even before the eventual decline of democracy in the 1930s, Western-style liberal constitutional democracy had not been fully introduced into Japan. Since the late nineteenth century, civil and political liberties had always been subject to strict legal restraints for the purpose of avoiding civil unrest, which occurred from time to time, and suppressing dissidents, nonconformists, and communists. Examples included the late nineteenth-century Public Security Regulations and the Peace Preservation Law of 1925. It may be observed, in this regard, that the rights guaranteed by the Meiji constitution existed only to the extent allowed by ordinary law; there was no mechanism for the review of the constitutionality of legislation.

Although the rise of military government, which finally replaced civilian rule in 1936, was the result of a combination of many circumstances, including the global economic depression, popular support for the military’s actions in China, and assassinations of civilian political leaders by members of the military, the deficiency of the Meiji constitution itself was also a significant factor. The constitution did not require the cabinet ministers or prime minister to be responsible to the Diet. They were exclusively appointed by and responsible to the emperor. Thus, the practice that evolved of...

17 Reischauer, supra note 3, at 89; Oda, supra note 8, at 30.
18 Reischauer, supra note 3, at 93.
19 Id. at 89.
20 Id. at 93; Dean, supra note 15, at 502.
21 Oda, supra note 8, at 29.
22 Reischauer, supra note 3, at 97.
23 Reischauer, supra note 3, chap. 9; Oda, supra note 8, at 31–32.
appointing elected Diet politicians to be ministers or prime ministers had no constitutional basis. Furthermore, under the constitution, the emperor alone had supreme command of the military forces. In practice, the military was not subject to the control of the civilian government. The trend since the early 1930s, when the army invaded and occupied Manchuria in northeastern China, was that matters of foreign policy and military actions were decided by the military itself. As the military gained control of the government in the 1930s, they turned Japan into a totalitarian and militaristic state ruled by the police and secret police, indoctrinating citizens with the Kokutai ideology\(^\text{24}\) of absolute loyalty to and total self-sacrifice for the divine emperor and, ultimately, launching the Pacific War.

After Japan’s defeat, it was subject to an American-dominated Allied occupation (1945–1952). Apart from helping Japan to rebuild its economy and society while demilitarizing it, the U.S. also aimed to transform Japan into a true liberal constitutional democracy. General MacArthur, Supreme Commander of the Allied Powers (SCAP), required the postwar Japanese government to initiate the drafting of a new constitution. Various political parties and groups put forward proposals for a draft constitution, and the government produced its own draft and submitted it to SCAP. It was found to be unsatisfactory, and, in February 1946, MacArthur instructed his staff to draft guidelines on the basis of which the Japanese government prepared a new draft. This new version, subject to amendments agreed upon by SCAP and the Diet, was passed by the newly elected House of Representatives in August 1946.\(^\text{25}\) It was promulgated, in November 1946, by Emperor Hirohito (who reigned from 1926 until his death in 1989) in accordance with the provisions for constitutional amendment stipulated in the Meiji constitution; thus constitutional continuity was maintained.

Constitutional continuity was also preserved by the maintenance of the institution of the emperor in the 1946 Constitution, although this institution was now radically transformed together with the basic principles of the Constitution and the political system established by it. The fundamental principles are the sovereignty of the people, pacifism (renunciation of war and the threat or use of military force), and the protection of fundamental human rights. The political system is a British-style system of parliamentary government. Judicial review of the constitutionality of legislation and governmental actions, on the model of the U.S. Constitution, has also been adopted by the new Constitution.

The preamble to the new Constitution contrasts sharply with that of the Meiji constitution. The former opens by declaring that “We, the Japanese people, . . . do proclaim that sovereign power resides with the people and do firmly establish this Constitution.” On the other hand, the basic structure and chapter arrangements in the new Constitution largely follow those of the Meiji constitution. Thus chapter 1 still concerns the emperor, who is now no more than “the symbol of the State and of the


\(^{25}\) Id. at 13.
unity of the people, deriving his position from the will of the people with whom resides sovereign power.”

“The advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of state.”

Chapter 2, a new chapter, is entitled “renunciation of war” and contains only one article—article 9, the most famous provision in the new Constitution. Chapter 3, on rights and duties of the people, provides for an elaborate list of civil and political rights, social, economic, and cultural rights, as well as property rights. Other chapters deal with the Diet (now the “highest organ of state power” consisting of two elected houses, the House of Representatives and the House of Councillors); the cabinet (now “responsible to the Diet”); the judiciary (with the power of constitutional review); finance; local self-government; constitutional amendment (requiring a two-thirds majority in each house and a majority popular vote at a referendum); the Constitution as supreme law; and with various supplementary provisions.

Despite its origins in the Allied occupation, the 1946 Constitution has survived and endured to become one of the oldest constitutions in the contemporary world. Despite occasional calls for and debates regarding revisions to the Constitution (particularly article 9), no single amendment has ever been initiated in the Diet, officially, much less enacted. The Constitution seems to have enjoyed widespread popular satisfaction, support, and respect. The rights and freedoms it guarantees are respected, generally, by the government. There has been no shortage of litigation on constitutional issues, although the Japanese Supreme Court is well-known for its conservatism and judicial restraint and has intervened to declare provisions in various acts of parliament unconstitutional on only eight occasions over a sixty-two-year period (1947–2008). Free and fair elections have been held, consistently, since the late 1940s, and both “conservative” and “progressive” political parties have participated, actively, in elections and politics. The long dominance (until 2009) of the Liberal Democratic Party in Japanese politics has been the choice of Japanese voters themselves. Postwar Japan is, in this author’s opinion, a success story of the transplant of Western liberal constitutional democracy to Asian soil.

26 Art. 1. For an English translation of this constitution, see Dean, supra note 15, at 617–627.

27 Art. 3


29 As pointed out by Beer (supra note 24, at 12), “some survey data have suggested the Constitution is the most respected and trusted of all Japan’s national institutions.”

30 Beer, supra note 24, at 9.

31 Oda, supra note 8, at 43; Oda, supra note 28, at 33–35; Lawrence W. Beer, Japan’s Constitutional System and Its Judicial Interpretation, in Law and Society in Contemporary Japan 7–35 (John O. Haley ed., 1988). However, in the last few years the Japanese Supreme Court seems to have become relatively more activist. See e.g., Masaki Ina, The Recent Ambivalent Case Law Trends of Japanese Supreme Court, paper presented at the 3rd Asian Forum for Constitutional Law (on “Asian Constitutionalism at Crossroads: New Challenges and Opportunities”) held at the National Taiwan University, Taipei, 25–26 September 2009.
3. The case of India

India, one of the world’s oldest and continuously flourishing civilizations, became much Westernized in its legal and political institutions in the course of colonization. “This transformation of the traditional normative system emerges as one of the most remarkable achievements of the history of inter-cultural relations.”32 The English East India Company, founded in 1600, began its activities in India in the seventeenth century, and, in 1858, the British government assumed sovereignty and took over full responsibility for the governance of India.33 Parliament enacted the Government of India Act 1858, establishing colonial rule of an authoritarian nature over India. The English common law, together with its underlying concepts and institutional embodiments such as independent courts of law and lawyers, were transplanted to the Raj.

Over the course of time, the British introduced popularly elected elements into the Indian legislature, developing the Indian political system in the direction of the Westminster model of representative government, though not for the purposes of independence. Indians formed their own political parties—the Indian National Congress (“Congress”) was established in 1885, and the Muslim League in 1906. The Home Rule movement—a campaign for self-government—was started by Congress during the First World War.34 Subsequently, Mahatma Gandhi led Congress in the “non-cooperation” movement, seeking complete independence for India. After the Second World War, the British finally agreed to grant India independence. The Muslim League’s proposal for the partition of British India into the new sovereign states of India and Pakistan was accepted, and the Indian Independence Act 1947 provided for the creation of India and Pakistan as two independent dominions, each having its own constituent assembly for the purpose of drafting its constitution. In 1949, India’s Constituent Assembly, after more than two years of deliberation, adopted the Constitution of the Indian Republic.

The Constitution, as originally enacted, consists of a preamble, 395 articles divided into 22 parts, and 8 schedules,35 making it the lengthiest constitution in the world. Many matters of administrative detail, governed elsewhere by ordinary law, are provided for in the Constitution. There is a significant degree of continuity between the Constitution and the Government of India Act 1935—the last preindependence constitutional instrument of India enacted by the British Parliament. Many provisions in the new Constitution are reproduced from the 1935 Act. The Constitution exhibits all the features of the Western liberal constitutional democratic state. It affirms the sovereignty of the people and the protection of human rights. Following the model prescribed in the 1935 act, it adopts a federal—or what some scholars call a

33 See, e.g., Barbara D. Metcalf & Thomas R. Metcalf, A Concise History of Modern India (2nd ed. 2006).
35 Over 100 amendment acts have been passed since the Constitution was first enacted, increasing the number of articles to over 440 and the number of schedules to 12.
quasi-federal—a system of division of power between the Union government and the governments of states. It establishes a British-style system of parliamentary government at both the Union and state levels. At the same time, American-style judicial review of the constitutionality of legislation and governmental acts is introduced.

One of the innovative features of the Indian Constitution is its provision in part IV for a set of “directive principles of state policy” ("DPs"), which are declared nonjusticiable before a court of law. The inspiration for this came from the Constitution of the Republic of Eire. The DPs include matters of general orientation, such as promotion of the welfare of the people by securing a just social order, establishing that “the ownership and control of the material resources of the community are so distributed as best to subserve the common good,” and avoiding “the concentration of wealth and means of production to the common detriment.” The DPs also cover matters of social, economic, and cultural rights, such as “the right to an adequate means of livelihood,” the right to work, to education, and to public assistance, while securing to the people “work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.”

The following DP is particularly significant given the circumstances of India as a society divided, traditionally, into castes and having huge social and economic inequalities: “The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes [listed in a schedule to the Constitution], and shall protect them from social injustice and all forms of exploitation.” It may be noted in this regard that the Constitution also provides for the reservation of seats for the Scheduled Castes and Scheduled Tribes in the House of the People (Lok Sabha, or the lower house of Parliament) and in the Legislative Assemblies of the states, and for the abolition of “untouchability”—a traditional concept associated with the caste known as the “untouchables.”

Thus, the Indian Constitution was designed not only to establish political structures and declare fundamental rights and freedoms but also to bring about social reform. The question of reverse discrimination or preferential discrimination for the benefit of the lower castes and tribes and “other socially and educationally backward classes”

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36 Reconstructing the Republic 14 (Upendra Baxi et al. eds., 1999).
38 Basu, supra note 34, at 29.
39 Art. 38 of the Constitution.
40 Art. 39(b).
41 Art. 39(c).
42 Art. 39(a).
43 Art. 41.
44 Art. 43.
45 Art. 46.
46 Arts. 330, 332, 334. See also art. 335.
47 Art. 17.
has been one of the most controversial subjects. For example, the implementation of the reports of the Mandal Commission in 1990—regarding reservations of certain percentages of vacancies in public employment to socially and educationally backward classes—led to large-scale caste violence. The constitutional issue that was raised concerned the relationship between equality of opportunity in matters of public employment and affirmative action, and it reached the Supreme Court in the case of Indra Sawhney v Union of India. In this case and in subsequent case law, the Court laid down detailed guidelines on what is constitutionally permissible in this regard.

Another arena of social change concerned land reform and economic policy, and this represented the single most important source of conflict between the Supreme Court and the government in Indian constitutional history. For a long time, there existed a natural tension between the government’s socialistic policies in this domain and the constitutional protection of private property rights. The Court’s defense—using its power of constitutional review of legislation—of the rights of rural landowners, adversely affected by agrarian reform, and of holders of property rights, affected by nationalization, brought it into repeated conflict with the government, which responded by using its control of a two-thirds majority in each of the houses of Parliament to enact constitutional amendments aimed at curtailing the court’s power of constitutional review. It was in the course of this struggle between Parliament and the Supreme Court for the custodianship of the Constitution that the Court developed the famous doctrine that it is beyond the competence of Parliament to amend provisions of the Constitution that pertain to its “basic structure.”

India is a heterogeneous society with multiple ethnic, religious, and linguistic groups. The federal structure established by the Constitution has proved to be flexible, and new states have been created from time to time in response to the politics of ethnic and other identities. In the constitutional relationship between the Union and the states, a controversial matter has been the use or misuse of article 356 of the Constitution, under which the president of the Union may displace the authority of

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49 Das, supra note 32, at 29, 33.
50 See arts. 16(1), (4) and 14 of the Constitution.
51 AIR 1993 SC 477.
55 See, generally, Sudhir Krishnaswamy, Democracy and Constitutionalism in India (2009).
56 See, generally, Metcalf & Metcalf, supra note 33; Baxi et al., supra note 36.
the state government and allow the Union government to impose direct rule if on receipt of a report from the governor of the state, or otherwise the president “is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution.”57 Article 356 has been used over a hundred times.58 In the *Bommai Case*,59 the Supreme Court sought to constrain the exercise of the article 356 power by formulating the test for judicial review in such circumstances.

Article 356 is in part XVIII of the Constitution entitled “Emergency Provisions.” The first article in this section, article 352, authorizes the president (acting on ministerial advice) to proclaim a state of emergency in India as a whole. A watershed and traumatic event in Indian constitutional history was the invocation of this article by Prime Minister Indira Gandhi in 1975, “ostensibly because internal disturbances allegedly threatened the security of India but, in fact, to prevent her being unseated as Prime Minister.”60 The emergency was proclaimed one day after the High Court of Allahabad found her technically guilty of some election malpractices.61 During the emergency, thousands of political opponents were put under detention.62 In 1977, Mrs. Gandhi lifted the emergency, called a general election, and was—contrary to her expectations—defeated by the Janata party.63 The Janata government reversed some of the constitutional amendments introduced by Mrs. Gandhi’s government that curtailed the constitutional review power of the judiciary, and introduced a constitutional amendment that narrows the scope of the emergency power.64

During the emergency, the Supreme Court made an infamous decision in the *Habeas Corpus* case,65 holding that preventive detention during the emergency was immune from judicial review. However, after the emergency, the Supreme Court reasserted its authority and a new phase of judicial activism began. Beginning with the landmark decision of *Maneka Gandhi*66 in 1978, the Court created a new body of jurisprudence67 on the basis of article 2168 of the Constitution giving both procedural and substantive due process protection to almost all the essential ingredients of a dignified and meaningful

57 Art. 356 of the Constitution.
58 Singh & Deva, supra note 37, at 31. In the period 1967–1977, art. 356 was used frequently and “ruthlessly” by the Union government of the Congress Party against State governments of other political parties; Dhavan, supra note 48, at 410.
60 Dhavan, supra note 48, at 381; Austin, supra note 54, at 7.
61 Das, supra note 32, at 22; Dhavan, supra note 48, at 381.
62 Austin, supra note 54, at 9.
63 METCALF & METCALF, supra note 33, at 257.
64 Kulshreshtha, supra note 53, at 370–371.
65 A.D.M. Jabalpur v. Shiv Kant Shukla, A.I.R. 1976 SC 1207. There was, however, a powerful dissenting judgment by Justice Khanna.
67 “Since then [1978], article 21 has grown into a colossus, a wide-spreading banyan tree, covering much ground under its shade”: Jain, supra note 52, at 98.
68 Art. 21 reads as follows: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”
life. This amounted to indirectly enforcing many of the DPs that are otherwise not enforceable in a court.69

Another major shift occurred in the 1980s. In Minerva Mills v. Union of India70 and in subsequent cases, the Court reaffirmed and further developed the “basic structure” doctrine regarding the limits of permissible constitutional amendments.71 Also in the 1980s, the famous Indian movement of public interest litigation was born and has flourished up to this day.72 To facilitate such litigation, the Supreme Court abandoned the traditional rules of locus standi and made itself available to the poor, illiterate, and underprivileged masses of people by, for example, developing its “epistolary jurisdiction.”73 It went far beyond the traditional role of adjudicator of disputes; for example, it appointed commissions of inquiry, established schemes of policy implementation, and assumed the task of monitoring their implementation. It became the champion of the rights of the socially disadvantaged and oppressed; it also intervened to tackle problems such as corruption, brutality by the police and in prisons, and environmental pollution.74 As Singh and Deva point out, “the extent and reach of the powers of [the] Indian judiciary, especially of the Supreme Court, is a matter of pride for any democratic Constitution.”75

Despite these achievements, “the overall effectiveness of the [Indian] judiciary is very much open to question.”76 For example, courts have huge backlogs of cases. The efficiency of the administrative system also leaves much to be desired, and problems of corruption still abound. The ethnic, caste, and religious tensions in India, occasionally, still give rise to communal violence. Nevertheless, given the immense social, economic, and political problems faced by India when it became independent more than six decades ago, its overall record in the practice of liberal constitutional democracy deserves, in this author’s opinion, to be recognized as a huge success. With a population of 1.1 billion, and 714 million eligible voters voting at over 800,000 polling stations at their last general election in 2009 to choose their government,77 the Indian achievement in constitutional democracy shines in Asia.

4. The case of Indonesia

In the course of history, the archipelagic country known, today, as Indonesia has seen the rise and fall of the civilizations of the Hindu-Buddhist Srivijaya empire (eighth to

69 Jain, supra note 52, at 98–99; Singh & Deva, supra note 37, at 612–613.
71 See Krishnaswamy, supra note 55; Basu, supra note 37, at 48; Singh & Deva, supra note 37, at 682–684.
73 Singh & Deva, supra note 37, at 676.
74 Das, supra note 32, at 38–44.
75 Singh & Deva, supra note 37, at 672.
fourteenth century A.D.) and the Majapahit empire (1293–1520). The ethnically heterogeneous population of Indonesia, currently more than 200 million, is predominantly Muslim. The territorial boundary of the modern state of Indonesia was defined by Dutch colonization. Indeed, the struggle for independence was the defining experience that inculcated the inhabitants of modern Indonesia with a sense of shared identity, unity, and nationalism. The Dutch first arrived in 1596, and, during the next three and a half centuries, colonized the whole of what is now Indonesia. Since the beginning of the twentieth century, the Dutch pursued the “Ethical Policy” of developing education and health services, however, as was not the case in India, preindependence Indonesia had no well-developed civil service bureaucracy or the experience of self-government by locally elected politicians.

The early 1900s saw the beginnings of a nationalist movement. “A turning point in the creation of an Indonesian identity” was a meeting of activists in 1928 at which they swore the “Youth Oath” and adopted the goals of “one nation, one homeland, and one language.” Another crucial event that led, ultimately, to Indonesian independence was the Japanese invasion and occupation during the Pacific War. Nationalist political activists, including Sukarno and Mohammed Hatta, collaborated with the Japanese and served in the government established by the Japanese in Indonesia. After Japan’s surrender, Sukarno on August 17, 1945, proclaimed the independence of Indonesia. The next day, a constitution (the 1945 Constitution) was promulgated. This constitution was hastily drafted in twenty days and was intended to be provisional only. Its principal draftsman was Soepomo, who rejected the liberal democratic notions of constraint on state power, checks and balances, and individuals’ rights vis-à-vis the state. Instead, he believed in a philosophy of the integral state, according to which the state and the individuals constituting it form an organic whole and the state, thus, necessarily represents the interests of the people. This philosophy

80 Id. at 75.
81 Id. at 92.
82 Id. at 75.
83 DAVID CHANDLER ET AL., THE Emergence OF MODERN SOUTHEAST ASIA: A NEW HISTORY 298 (Norman G. Owen ed., 2005). The “one language” was Malay, which was called “Bahasa Indonesia.”
86 Id. at 92.
was derived from the German tradition of Hegelian thought and of the *Volksgeist*,\(^89\) in combination with the indigenous principle of “family-togetherness” (*gotong royong*).\(^90\)

The preamble to the constitution is a very important part of it, particularly when viewed in retrospect. The last passage in the preamble summarizes what has been known as *Pancasila* (“the Five Pillars”),\(^91\) an ideology first enunciated by Sukarno in June 1945.\(^92\) The passage reads: “We believe in an all-embracing God; in righteous and moral humanity, in the unity of Indonesia. We believe in democracy, wisely guided and led by close contact with the people through consultation so that there shall result social justice for the whole Indonesian people.”\(^93\) *Pancasila* rejects, implicitly, the notion of the Islamic state and affirms the principle of tolerance for diverse religious faiths among the people.\(^94\)

The preamble also states that the Indonesian State is “a republic with sovereignty vested in the people.” The constitution, as a whole, is a brief document with only thirty-seven articles, although, when published, it was accompanied by a document entitled “Elucidation of the Constitution of the Republic of Indonesia,” which consists of notes providing guidance for the interpretation of the constitution.\(^95\) Another important document contemporaneous with the constitution is the “Jakarta Charter,” signed by leaders of the independence movement in June 1945.\(^96\) The charter declares the independence of Indonesia and states the principles of *Pancasila*; however, it also includes a phrase whose exclusion from the final text of the constitution has been considered highly significant:\(^97\) “with the obligation for the professors [believers] of the Islamic faith to abide by the Islamic laws.”

The key state institutions established by the constitution are the president; the People’s Consultative Assembly (*Majelis Permusjawaratan Rakjat*, or MPR), which elects the president; the Supreme Advisory Council; a legislature known as the House of Representatives (*Dewan Perwakilan Rakyat*, or DPR); and the judiciary, led by the Supreme Court. How members of key institutions, such as the MPR and DPR, are to be selected is left open for prescription by ordinary law. For example, it is provided that the MPR is to consist of members of the DPR “and delegates of regional territories and

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\(^89\) Lindsey, *id.* at 292.


\(^91\) *Id.* at 463, 468, 493; Smith, *supra* note 79, at 83.

\(^92\) Benesch, *supra* note 87, at 179.


\(^95\) Wahjono, *supra* note 90, at 493 (note 6 thereon); Lindsey, *supra* note 88, at 319 (note 57 thereon). For the text of the Elucidation, see McBeath, *supra* note 93 at 15–22.

\(^96\) For the text of the Charter, see McBeath, *supra* note 93 at 14.

\(^97\) Such exclusion was intended to suggest that the Republic of Indonesia was a secular and multireligious state rather than an Islamic state. As pointed out by Ellis (*supra* note 88 at 29–30), “[t]his phrase had been contained in the original 1945 Constitution until its penultimate draft and had remained the subject of deep divisions during the constitutional debates of the 1950s.”
other groups in accordance with the provisions prescribed by statutes,"98 and that the organization of the DPR “shall be prescribed by law.”99

The constitution contains few provisions on human rights. There is no chapter with the title of citizens’ rights. Chapter 10, on “Citizenship,” contains three articles, two of which deal with the right to work and to form unions, and freedom of assembly, speech, and press.100 Freedom of religion is mentioned in the chapter on religion,101 and the right to education102 in the chapter on education.101 The chapter on social welfare104 provides that the state shall take care of the poor and children who need care.

After the proclamation of Indonesian independence, the Dutch made repeated attempts to regain control of Indonesia, including sending troops to fight the proindependence forces. In December 1948, Sukarno and Hatta were captured by the Dutch, but the Japanese-trained military in Indonesia continued the resistance.105 The United Nations intervened, and, at the Hague Conference of 1949, the Netherlands finally agreed to renounce sovereignty over Indonesia and to recognize the Republic of the United States of Indonesia, established in December 1949 with a provisional federal constitution adopted in February 1950.106 Federalism, however, was perceived by many Indonesians as a colonial ploy to weaken the new Indonesian state by means of a strategy of “divide and rule,”107 and the federal structure was soon abandoned with the promulgation of another interim constitution in August 1950.108 This constitution provided that a new constitution would be drafted by a constituent assembly to be elected for this purpose.

Departing from the 1945 constitution, the constitution of August 1950 provided for a parliamentary system of government, with power vested in a prime minister accountable to an unicameral Parliament.109 The president was reduced to a head of state without much executive power, although he could dissolve Parliament and proclaim martial law.110 In the 1950s, the new Indonesian republic thus experimented with the practice of liberal constitutional democracy.111 Approximately fifty political

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98 Art. 2(1) of the Constitution.
99 Art. 19(1).
100 Arts. 27, 28.
101 Chap. XI.
102 Art. 31(1).
103 Chap. XIII.
104 Chap. XIV.
105 Smith, supra note 79, at 76.
106 Benesch, supra note 87, at 180–181.
107 Smith, supra note 79, at 87; Ellis, supra note 88, at 23.
108 Benesch, supra note 87, at 181; Indrayana, supra note 85, at 93–94.
109 Benesch, supra note 87, at 181.
110 Sukarno was the first president of the republic of Indonesia—an office he occupied from 1945 to 1967. See Wahjono, supra note 90, at 497.
111 See, generally, Democracy in Indonesia: 1950s and 1990s (David Bourchier and John Legge eds., 1994).
parties were formed. In September 1955, the first general election was held, with sixteen political parties securing seats in Parliament. There was no stable governing coalition; there was much political infighting. In December 1955, the constituent assembly was elected for the purpose of drafting a new constitution. However, before the assembly could complete its task, Sukarno proclaimed martial law, in March 1957, and began to concentrate power in himself with the support of the military. In July 1959, Indonesia’s experiment with Western-style liberal constitutional democracy finally came to an end, with Sukarno decreeing the dissolution of the constituent assembly, setting aside the existing 1950 constitution and declaring that Indonesia would now be governed in accordance with the 1945 constitution. Sukarno called the new political order “Guided Democracy” and asserted that only this kind of democracy was suitable for Indonesia. Ten political parties, specially recognized by Sukarno’s government, were allowed to exist.

In 1965, in the aftermath of an alleged coup by the Indonesian Communist Party, General Suharto took power, which he consolidated by 1967. The suppression of the Communists and other political opponents in 1965 was associated with the massacre of an estimated one half million to one million people—“one of the worst mass murders of the twentieth century.” The political system that Suharto established was called the “New Order.” There were guaranteed seats for the military in the parliamentary bodies in accordance with the doctrine of dwifungsi—the dual function, both military and political, of the military in recognition of their great contribution to Indonesia’s struggle for independence. More than half the members of the MPR were appointed by Suharto himself. Although elections to the DPR were held every five years, participation by the candidates was controlled, and only three political parties (including Golkar, Suharto’s own party, and two other friendly parties, one Islamic and one secular) were allowed to exist. Suharto was repeatedly elected by the MPR as president, the 1945 constitution providing no limit on the number of terms a president can serve. Under Suharto’s rule, the courts were made subservient to the regime and, generally, were considered corrupt and ineffective in the administration.

112 Smith, supra note 79, at 103.
113 Id. at 76.
114 Benesch, supra note 87, at 181.
115 Wahjono, supra note 90, at 481; Indrayana, supra note 85, at 95.
117 Smith, supra note 79, at 77.
118 CHANDLER ET AL., supra note 83, at 434–435; SARDISAI, supra note 84, at 277–278.
119 Smith, supra note 79, at 77.
120 CHANDLER ET AL., supra note 83, at 436–438.
121 Wahjono, supra note 90, at 479.
122 Smith, supra note 79, at 91.
123 Id. at 77, 98.
of justice. Although a limited degree of pluralism was permitted, dissidents were subject, occasionally, to persecution.

Although Indonesia achieved rapid economic growth under Suharto’s one-man rule, dissatisfaction and opposition began to increase after the mid-1990s. The New Order regime finally crumbled under the pressure of the Asian financial crisis that began in 1997. Large-scale demonstrations and riots erupted in 1998, with the populace blaming the regime for its “corruption, collusion and nepotism.” Suharto was finally forced to resign in May 1998, which opened a new chapter in Indonesia’s constitutional history.

In 1998, most observers could not have predicted that Indonesia’s transition from authoritarianism to constitutional democracy would have been as smooth and successful as it now seems, in retrospect, in 2010. Crucial steps toward democratization were taken by the existing ruling elite (including the new president, Bacharuddin Jusuf Habibie, and the members of the MPR) immediately after Suharto’s fall. Civil and political liberties were restored, new electoral laws were passed, and the general election, originally scheduled for 2002, was brought forward to 1999. Forty-eight political parties participated in the 1999 election, the first free election since 1955. The newly elected MPR enacted a series of four constitutional amendments from 1999 to 2002, at the end of which time the Indonesian Constitution had all the features of a Western-style liberal constitutional democracy. Despite the very extensive amendments, the amended document retained the title of “the 1945 Constitution,” in recognition of the symbolic value of that Constitution and of the people’s respect for and

125 Smith, supra note 79, at 108.
126 See, e.g., Chandler et al., supra note 83, at 437; SarDesai, supra note 84, at 281–282; Lindsey, supra note 88, at 297.
127 Smith, supra note 79, at 79.
128 SarDesai, supra note 84, at 282–283; Chandler et al., supra note 83, at 439.
129 See, e.g., Donald L. Horowitz, Indonesia’s Distinctive Path to Constitutional Democracy, paper presented at Conference on Comparative Constitutional Design, University of Chicago Law School, 16–17 October 2009 (being chapter 1 of the author’s forthcoming book on Indonesia’s transition to a constitutional democracy).
130 Benesch, supra note 87, at 183.
131 Indrayana, supra note 85, at 96.
132 Smith, supra note 79, at 98–100.
133 See, generally, Indrayana, supra note 85; Benesch, supra note 87; Ellis, supra note 88; Tim Lindsey, Indonesian Constitutional Reform: Muddling Towards Democracy, 6 Sing. J. Int’l & Comp. L. 244 (2002).
134 As pointed out by Lindsey, although “[f]ormal ideological hostility to rule of law and Western ideas of human rights had . . . enjoyed a long and bloody pedigree in Indonesia” (supra note 88 at 290) and the “Asian values discourse [had once been] a useful tool for the New Order [regime]” (at 289), “’Asian values’ seem to have been simply part of the baggage taken by the departing Soeharto. There are now no voices raised in the legislature or the media to defend the Bangkok Declaration and ‘Asian values’ or the New Order model. Indeed, ‘human rights’ has become part of the language of public life” (at 297). “Indonesia had reconstructed its Rechtsstaat on liberal democratic principles” (at 286).
emotional attachment to it, particularly its preamble and the \textit{Pancasila} stated therein.\textsuperscript{135} The powers of the legislature (the DPR) relative to the president were substantially increased, and an upper house or regional “Senate”—the Regional Representative Council (\textit{Dewan Perwakilan Daerah}, or DPD)—was established to represent the interests of the regions.\textsuperscript{136} Both the DPR and DPD were now to be elected directly by the people, and the members of these two bodies now constitute the MPR.

The MPR gave up its original power of electing the president; that process was replaced by the direct popular election of the president. The duration of a president’s holding office was limited to two terms, and seats reserved for the military in the MPR and DPR were completely abolished. Regional autonomy was introduced. Elaborate provisions on human rights were added to the Constitution. The principles of the rule of law (that is, the \textit{Rechtsstaat}, or the state based on the rule of law) and judicial independence were written into the Constitution.\textsuperscript{137} A Constitutional Court was created by the third constitutional amendment in 2001; it was established and started to function in 2003, and, since then, has established a credible record as a court willing “to make controversial judgments if the facts so indicate, tempered by a recognition of political realities.”\textsuperscript{138} The constitutional crisis of the MPR’s impeachment of President Wahid in 2001 (who responded by attempting to proclaim a state of emergency and to dissolve the MPR) and its election of Megawati Sukarnoputri as president passed peacefully.\textsuperscript{139} The presidential elections and general elections of 2004 and 2009 were recognized, generally, as free and fair elections, with the 2004 election resulting in a peaceful transfer of government.\textsuperscript{140}

Indonesia may now be considered a new, young liberal constitutional democracy. The problems it faces are immense, given its heterogeneous population, ethnic and religious tensions, gross social and economic inequalities, low level of economic development, corruption in the government and the judiciary, occasional terrorist attacks, secessionist tendencies in some regions, and so forth. Yet despite the many odds against them, the Indonesian people have proved capable of managing a complex but peaceful transition from authoritarian rule to democratic constitutionalism, and it is likely that they can achieve even more in future. The Indonesian story of constitutional reform is,

\textsuperscript{135} Indrayana, \textit{supra} note 85, at 96–97.
\textsuperscript{136} Id. at 107–108.
\textsuperscript{137} Id. at 113.
\textsuperscript{139} Benesch, \textit{supra} note 87, at 190–191; Ellis, \textit{supra} note 88, at 27.
\textsuperscript{140} In the July 2009 election, the incumbent President Susilo Bambang Yudhoyono won a second term of office.
in this author’s opinion, a story of hope that can provide inspiration and encouragement for constitutional projects elsewhere in Asia.

5. The case of Korea

Korea, traditionally within the sphere of Chinese Confucian culture, in the nineteenth century was under the rule of the Chosen dynasty (1392–1910) and was considered a Chinese tributary state. After China’s defeat by Japan in the war of 1894–95 and Russia’s defeat by Japan in the war of 1904–5, Korea came under Japanese control and was annexed by Japan in 1910. Japanese colonial rule of a highly authoritarian nature continued until the end of the Second World War, when Korea was divided into two regions under the influence of the USSR and the U.S., respectively. In 1948, the Democratic People’s Republic of Korea (DPRK) was established in North Korea, and the Republic of Korea in the south. In the following, the constitutional developments in the two Koreas will be discussed separately.

Although South Korea’s legal system has been shaped largely by its Japanese heritage and follows the Continental civil law tradition, American constitutionalism has been a significant influence on South Korean constitutional law. The first constitution of the Republic of Korea was adopted in June 1948. Sources of influence on it included not only the U.S. Constitution but also the constitution of the Weimar Republic of prewar Germany and the Constitution of the Republic of China. The constitution provided for a Western-style liberal constitutional democracy.

After the constitution was promulgated, the National Assembly, which was chosen in the first general election in South Korea, in May 1948, elected Dr. Syngman Rhee as the first president. During the Korean War 1950–53, Rhee sought to introduce a constitutional amendment to change the president’s mode of election to direct election by the populace—a change the National Assembly did not support, originally. In May 1952, Rhee imposed martial law on Pusan, the temporary wartime capital, and made use of his expanded powers under martial law to put pressure on the National Assembly, with the result that the constitutional amendment he proposed was approved in July 1952. Shortly thereafter, Rhee was elected for a second term. In 1954, Rhee secured by dubious means a second constitutional amendment, which created an exception to the two-term limit on the presidency by allowing the first president of the republic to run for office for an unlimited number of terms. In 1955, Rhee was reelected for a third term. In March 1960, he was again reelected for a fourth term.

142 Constitutions of the Countries of the World, chapter on Korea (Gisbert H. Flanz ed., looseleaf).
145 Yoon, id. at 99; Kleiner, id. at 111; Cumings, id. at 342–343.
This time the election result was not accepted by significant numbers of citizens who believed that the election had been rigged. Student-led demonstrations led to the police opening fire into the crowd in Seoul on April 19, 1960. On the same day, the president declared martial law and called in the troops. But demonstrations and riots continued, and Rhee was forced to resign on April 26. The event became known as the “Righteous Student Uprising of 19 April.”

After Rhee’s resignation, an interim government was formed, and the existing National Assembly introduced amendments to the constitution in June 1960 that substituted a parliamentary system for the presidential system. The National Assembly of the second republic was elected in July 1960. The liberal constitutional democracy of this second republic was short-lived, however. The new government proved to be ineffective. Economic conditions worsened; there were almost daily demonstrations; procommunist and radical elements seemed to be gaining influence.

A coup was launched by General Park Chung-hee in May 1961. Martial law was proclaimed throughout the nation. A Supreme Council of National Reconstruction was established to take over the powers of government and the National Assembly, which was dissolved. In June, the council enacted the Emergency Measures Law on National Reconstruction, which overrode the constitution. In December, an amended constitution, reintroducing the presidential system, was approved in a national referendum. A presidential election was held, in October 1963, under the 1962 constitution, and Park was elected president of the third republic. In 1967, he was reelected president for a second term and, in 1969, he secured a constitutional amendment, approved by both the National Assembly (despite the opposition party’s opposition) and a referendum, which allowed an incumbent president to run for a third term. In 1971, Park was reelected for a third term, narrowly defeating the opposition candidate Kim Dae-jung.

Another turning point in South Korea’s constitutional history occurred in 1971–72. In December of 1971, President Park proclaimed a state of national emergency, alleging national security concerns and a possible invasion by North Korea. Shortly thereafter, the Law on Special Measures for National Protection and Defense was enacted by the National Assembly, authorizing restrictions on human rights and press freedom, emergency economic measures, and requisition of property. President Park took an even more drastic step toward authoritarianism in 1972. On October

146 CUMINGS, id. at 344. KLEINER, id. at 126; NAHM, supra note 143, at 406.
147 NAHM, id. at 406.
148 A major source of influence on the 1960 Constitution was the Constitution (Basic Law) of the Federal Republic of Germany (West Germany) enacted in 1949: see Flanz ed., supra note 142.
149 Articles 73–75 of this Constitution dealt with emergency powers. For example, art. 75(5) provided that the president shall lift the proclaimed state of siege if so requested by the National Assembly: see Flanz ed., supra note 142, at 7–8.
150 YOON, supra note 144 at 102–103; Kim & Lee, supra note 141 at 312–313.
152 NAHM, supra note 143, at 425–426.
153 Flanz ed., supra note 142.
17, nationwide martial law was suddenly proclaimed. Assemblies and demonstrations were banned; press censorship was imposed; the National Assembly was dissolved “by an extra-constitutional power”,154 political parties’ activities were banned. Park claimed that the measures were necessary in order to establish a new system that would facilitate dialogue between South and North Korea and eventual unification.155 As pointed out by Kleiner, “the measures of 17 October 1972 were an attack against the constitution. Park Chung Hee had plotted against his own constitution.”156

On November 21, 1972, with the nation still under martial law, a new constitution was approved in a referendum. It was known as the Yushin (meaning “revitalizing reforms”)157 constitution, and it purported to introduce a “Korean-style democracy.”158 In December, Park was elected president of the fourth republic by the National Conference for Unification (NCU) established under the 1972 constitution—“a constitution which legalized authoritarian rule.”159 South Korea had entered a “‘dark age’ of constitutionalism.”160

The 1972 constitution expanded the emergency powers of the president and expressly authorized the suspension of constitutional rights by emergency measures.161 In the fourth republic of 1972–79, these powers were used extensively to introduce draconian measures to suppress movements for the amendment of the constitution or for liberalization and democratization. The Yushin system was reaffirmed by a national referendum in 1975, and Park was reelected president by the NCU in 1976.

In October 1979, “the most serious student uprising since 1960”162 developed after the expulsion from the National Assembly of Kim Young-sam, a leading opposition politician. On October 26, President Park was assassinated. Martial law was immediately proclaimed throughout South Korea. In December 1979, General Chun Doo-hwan seized power within the military and, in May 1980, demonstrations erupted all over the country demanding the termination of martial law and democratization. Chun opted for repression. In protest, what became known as the “Kwangju Uprising” took place from May 18 to 27. “In the early hours of 27 May 1980, Kwangju was conquered by troops in an assault like in times of war.”163 The event was “Korea’s Tiananmen nightmare in which students and young people were slaughtered on a scale the same as or greater than that in ‘People’s’ China in June 1989.”164

154 Yoon, supra note 144, at 103.
155 Kim, supra note 151, at 156–157; Flanz ed., supra note 142.
156 Kleiner, supra note 144, at 154. Kim (supra note 151, at 139) also referred to the actions on 17 October 1972 as “extra-constitutional emergency measures.”
157 Yushin is the Korean equivalent of the Japanese term issin, which was the slogan of the Meiji Reform of 1868; Cumings, supra note 144, at 358; Kim & Lee, supra note 141, at 317.
158 Kim, supra note 151, at 157; Yoon, supra note 144, at 104; Cumings, supra note 144, at 359; Kleiner, supra note 144, at 156.
159 Kleiner, id. at 156.
160 Kim & Lee, supra note 141, at 318.
161 Art. 53 of the Constitution deals with emergency measures; art. 54 deals with martial law; see Flanz ed., supra note 142.
162 Nahm, supra note 143, at 431.
163 Cumings, supra note 144, at 177.
164 Id. at 338.
In August 1980, the NCU elected Chun as president. A new constitution, which, unlike the Yushin constitution, was relatively liberal democratic in orientation, was approved by a referendum in October 1980. The emergency powers granted to the president by the Yushin constitution was curtailed by the new Constitution. See Nahm, supra note 143, at 437. The new Constitution also provided for the limitation of the president’s term of office to one term. See Kim & Lee, supra note 141, at 324. The new Constitution further curtails the President’s power to issue emergency decrees. See Nahm, supra note 143, at 443.

The consolidation of constitutional democracy in South Korea had clearly taken place, and regression back to authoritarianism or military rule has become all but inconceivable. “Transitional justice” has been achieved, to some extent, by the prosecution and conviction, in 1995, of two former presidents, Chun and Roh, for treason and corruption. Since its establishment more than twenty years ago, the Korean Constitutional Court has built up a strong reputation as a custodian of the

See Sangmook Lee, Democratic Transition and the Consolidation of Democracy in South Korea, 3 TAIWAN JOURNAL OF DEMOCRACY 99 (2007).

See Asian New Democracies: The Philippines, South Korea and Taiwan Compared (Hsin-Huang Michael Hsiao ed., 2006).


See Byung-Kook Kim, Korea’s Crisis of Success, in Democracy in East Asia 113–132 (Larry Diamond and Marc F. Plattner eds., 1998).


Constitution and defender of human rights; it has declared statutory provisions and governmental actions unconstitutional in hundreds of cases; and it has adjudicated on critical political issues, such as those arising from the trials of the two former presidents as well as the National Assembly’s impeachment of President Roh Moo-hyun in 2004. Through the activities of the Constitutional Court, the Constitution has become a normative document regulating the lives of the people and the operation of the government. South Korea today, one of Asia’s major economic powers, has thus become one of the strongholds of liberal constitutional democracy in Asia. As one historian of modern Korea writes:

... democracy is not a gift or a political regime that one is born with but something that must be fought for every inch of the way, in every society. In this sense, the Korean struggle has been so enduring that there may be no country more deserving of democracy in our time than the Republic of Korea.

5.1. North Korea

In sharp contrast with the tumultuous decades that South Korea has gone through, as the struggles between the forces of dictatorship and democracy were waged, the totalitarian Communist regime in North Korea has apparently enjoyed a remarkable degree of political and constitutional stability and continuity. Since the DPRK was founded in 1948, North Korea has been under strong one-man rule by Kim Il-sung (who ruled until his death in 1994) and then by his son Kim Jong-il. It has been pointed out that the legitimacy of the latter’s position is based, actually, on dynastic succession rather than personal or ideological characteristics. In the following section, the major features of North Korea’s first constitution of 1948 and then the 1972 Constitution and its amendments will be briefly introduced.

The 1948 constitution was modeled, largely, on the Soviet Union’s Stalinist constitution of 1936. It is said that Stalin himself edited its original draft. The constitution provided for a Soviet-style political system in which supreme power, in theory, was vested in the elected Supreme People’s Assembly. In practice, of course, power has been monopolized by the Communist Party—known in North Korea as the Korean Workers’ Party—and its supreme leader. It has been pointed out that elections “have been pro forma, with only one Party-approved candidate running for each seat.”

175 Hahm, Rule of Law in South Korea, supra note 172, at 392.
176 Cummings, supra note 144, at 339.
177 Constitutions of the Countries of the World, chapter on the Democratic People’s Republic of Korea, introductory note by Rainer Grote, at 9 (Rüdiger Wolfrum and Rainer Grote eds., looseleaf).
178 Grote, Id. at 5.
179 Id. at 4.
Executive power was vested in the cabinet and the premier. There were provisions on the rights and duties of citizens. As far as the economic domain was concerned, the 1948 constitution embodied a compromise, so called, with respect to the interests of the existing middle class: it recognized a certain degree of private ownership of the means of production and the freedom to set up a business.\(^{181}\)

Various amendments to the 1948 constitution were introduced in 1954, 1955, and 1962.\(^{182}\) In 1972, an entirely new Constitution was enacted. Whereas the 1948 constitution was called a “people’s democratic constitution,”\(^{183}\) reflecting the principles of “People’s Democracy”\(^{184}\) rather than full socialism, the 1972 Constitution was called the Socialist Constitution of the DPRK. Its promulgation marked the end of the earlier purported compromises regarding nonsocialist elements in the economy and the further consolidation of Kim Il-sung’s strongman rule; indeed, a new and all-powerful position of president was created for Kim. The new Constitution stated that the DPRK “is guided in its activity by the Juche idea of the Workers’ Party of Korea, which is a creative application of Marxism-Leninism to our country’s reality.”\(^{185}\) The doctrine of Juche (or chuch‘e, which may be translated as self-reliance or self-determination) was first formulated by Kim in 1966.\(^{186}\) The 1972 Constitution also incorporated other ideas developed by Kim, sometimes named according to the places where Kim first spoke of these notions; for example, the Ch’ongsan-ni method, the Ch’ollima movement, and the Taean work system.\(^{187}\) Under this Constitution, there was no longer any scope for private economic activities. A planned economy was provided for, and taxation was abolished.\(^{188}\) Regarding citizens’ rights and duties, the new Constitution made it clear that they were based on the collectivist principle of “one for all and all for one”,\(^{189}\) thus, societal interests are to prevail over individuals’ interests.

The 1972 Constitution was amended in 1992, then more extensively in 1998 after Kim Il-sung’s death in 1994, and, most recently, in 2009. Probably in response to the collapse of communism in the Soviet Union and Eastern Europe, the Constitution as amended in 1992 no longer links the Juche idea with Marxism-Leninism; the former now stands on its own as the DPRK’s guiding ideology.\(^{190}\) The 1992 amendment also modified the economic provisions in the 1972 Constitution to make room for foreign investment.\(^{191}\)

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\(^{181}\) Grote, supra note 177, at 5–6.

\(^{182}\) Constitutions of the Countries of the World, supra note 177, volume on “historic constitutions,” chapter on the People’s Democratic Republic of Korea.

\(^{183}\) Cho, supra note 180, at 271.

\(^{184}\) Constitutions, supra note 182, at 4.

\(^{185}\) Art. 4 of the 1972 Constitution.

\(^{186}\) Cho, supra note 180, at 273.

\(^{187}\) Id. at 273–276.

\(^{188}\) Id. at 274–276.

\(^{189}\) Article 49 of the 1972 Constitution. See also Grote, supra note 177, at 6; Cho, supra note 180, at 292.

\(^{190}\) Grote, supra note 177, at 7.

\(^{191}\) Id. at 7–8.
The Constitution, as amended in 1998, states in its preamble that it “is a Kim Il-sung Constitution which legally embodies Comrade Kim Il-sung’s Juche State Construction ideology and achievements.” The office of the president was abolished, and the top government institutions, basically, reverted to the positions they were in before the 1972 Constitution was introduced. The preamble refers to Kim Il-sung as “the eternal President of the Republic” and declares that the Korean people will defend and carry forward his ideas and complete the Juche revolution under the leadership of the Workers’ Party of Korea. The amended Constitution expressly stipulates that “[t]he DPRK shall conduct all activities under the leadership of the Workers’ Party of Korea.” As for the economic domain, the amended Constitution extends the scope of private property rights and allows citizens to engage, to some extent, in private economic activities.

In April 2009, the Constitution was further amended. The amendments were designed, apparently, to consolidate the position of Kim Jong-il, who occupies the position—among others—of chairman of the National Defense Commission. The amended Constitution provides that the chairman is the “supreme leader” of the DPRK. The power and jurisdiction of the National Defense Commission are expanded by the amendments. The ideology of Songun, which may be translated as “military first” or “priority to the military,” was developed by Kim Jong-il in the late 1990s and was written into the Constitution; it was added to the existing Juche ideology as the basic guiding principles of the regime. The amendments also deleted all references in the Constitution to communism, although references to socialism have been retained. A provision that the state respects and protects citizens’ rights was also introduced.

6. The case of China, including Taiwan

Western ideas of constitutionalism and democracy were introduced into China in the late nineteenth century and, in the first decade of the twentieth century, the Qing empire started to prepare for the introduction of a constitutional monarchy. Before

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192 See the discussion in id. at 8–14.
193 Art. 11 of the Constitution.
194 See Grote, supra note 177, at 12.
196 This means “the military guarding the country as well as building the economy”: Herskovitz, supra note 195.
197 See, e.g., Xiaohong Xiao-Planes, Of Constitutions and Constitutionalism: Trying to Build a New Political Order in China, 1908–1949, in BUILDING CONSTITUTIONALISM IN CHINA 37–58 (Stéphanie Balme and Michael W. Dowdle eds., 2009).
this could materialize, the Qing regime collapsed as a result of the 1911 Revolution.\footnote{On modern Chinese history, see, e.g., John K. Fairbank, The Great Chinese Revolution 1800–1985 (1987); Immanuel C.Y. Hsu, The Rise of Modern China (2000).}

The establishment of the new Republic of China (ROC) was proclaimed in 1912. In the first one and a half decades of the republican era, several constitutions—mainly, Western-style and liberal democratic in orientation—were promulgated or drafted by successive governments in Beijing, though none was effective, as China was beset with warlordism and civil strife.\footnote{See Andrew J. Nathan, Peking Politics, 1918–1923: Factionalism and the Failure of Constitutionalism (1976).} In 1928, Chiang Kai-shek, leader of the Chinese Nationalist Party (Kuomintang or KMT), founded earlier by Dr. Sun Yat-sen, succeeded in defeating the warlords and established a national government of the ROC with its capital in Nanking. However, civil war still raged between the KMT and the Chinese Communist Party (CCP, founded in 1921) until the so-called Xi’an Incident of 1936, after which Chiang stopped his military campaigns against the Communists (who had by that time retreated to the remote town of Yan’an in Shaanxi province) and entered into an alliance with them in order to face the threat of Japanese invasion.

The KMT’s approach to constitutional development was based on Sun Yat-sen’s three-stage program for China’s political transformation.\footnote{See, generally, E. C. Y. Tseng, Democratic and Authoritarian Elements in Twentieth-Century Chinese Political Thought (unpublished Ph.D. thesis, 1968); C. C. Tan, Chinese Political Thought in the Twentieth Century (1972).} The first stage was military government for the purpose of ending warlordism and unifying the country. The second was preparation for constitutional democracy under the KMT’s political tutelage. The third and final stage would be constitutional government. Thus Chiang’s government promulgated a provisional constitution in 1931 known as the Constitution of the ROC in the Period of Political Tutelage, which expressly vested political power in the KMT.\footnote{See, generally, Pan Wei-Tung, The Chinese Constitution: A Study of Forty Years of Constitution-Making in China (1983).}

After the end of World War II, and before civil war erupted again between the KMT and the CCP, a new constitution for the ROC was adopted by a constituent assembly convened by the KMT in December 1946.\footnote{See, generally, Ch’ien Tuan-Sheng, The Government and Politics of China 1912–1949 (1950).} The original purpose of this constitution—at least on the face of it—was to move China from the stage of political tutelage by the KMT to a full liberal constitutional democracy with a government based on the separation of powers,\footnote{Dr. Sun Yat-sen proposed that instead of the separation of three powers in the West, China should adopt a five-power constitution: see Ch’ien, id. at 152.} elected by free multiparty elections, and respectful of civil liberties and human rights. Article 1 of this Constitution declares: “The Republic of China, founded on the Three Principles of the People, shall be a democratic republic of the people, to be governed by the people and for the people.” The “Three Principles of the People” represented the KMT’s ideology; they had been developed by
Sun Yat-sen and consist of the Principle of People’s National Consciousness, the Principle of People’s Rights, and the Principle of People’s Livelihood. 204

Although the 1946 ROC Constitution contains provisions on separation of powers, checks and balances, free elections and human rights, the force of these provisions was suspended, largely as the result of the following events. 205 As China descended into a state of civil war, the KMT-led National Assembly, in April 1948, introduced a constitutional amendment known as the Temporary Provisions for the Period of National Mobilization to Suppress the Communist Rebellion (the “Temporary Provisions”), which expanded the emergency powers of the president. Jieyan, which may be translated as a state of siege or martial law, was declared by the KMT government, in December 1948, in mainland China and, in May of 1949, in Taiwan, which was recovered from the Japanese at the end of World War II after the island had experienced a half century of Japanese colonial rule. After its defeat by the Communist forces on the mainland, the KMT government retreated to Taiwan in 1949. 206 We now proceed to trace the subsequent constitutional developments in Taiwan under the KMT government of the ROC before turning back to the Chinese mainland.

6.1. Taiwan

It was not until July 1987 that the jieyan or martial law decree of 1949 was finally lifted by President Chiang Ching-kuo, son of Chiang Kai-shek. A new era of liberalization and democratization was then inaugurated in Taiwan. 207 In 1991, the National Assembly repealed the Temporary Provisions and introduced the first of a series of constitutional amendments known as the Additional Articles to the ROC Constitution. Since then, a total of six sets of further amendments have been introduced, in 1992, 1994, 1997, 1999, 2000, and 2005, respectively, 208 with the 1999 amendment invalidated by the constitutional court of the ROC, the Council of Grand Justices. 209

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204 See the works cited in note 200 above, and Hsü, supra note 198, at 459.
209 The Council of Grand Justices’ Interpretation No. 499 (issued in 2000). The Council’s interpretations (with English translation) are available at http://www.judicial.gov.tw/constitutionalcourt. In Interpretation No. 499, the constitutional amendments of 1999 were struck down both because of procedural defects during the enactment process and because some of the substantive provisions introduced by the amendments were held to be inconsistent with principles that go to the essence of the constitutional order of a liberal democracy.
Since the island’s liberalization and democratization in the late 1980s and 1990s, Taiwan’s political system has moved to converge with the systems in Western liberal constitutional democratic states.\textsuperscript{210} There has been free electoral competition for the office of the presidency and for seats in parliamentary institutions\textsuperscript{211} among different political parties and activists. A two-party system has emerged, with the KMT and the Democratic Progressive Party (DPP) as the dominant groups. The KMT, which had ruled Taiwan since the island’s liberation from Japan in 1945, handed over power, peacefully, to the DPP after its defeat at the presidential election of 2000. Chen Shui-bian, the DPP leader, became president and was reelected for a second term in 2004. In 2008, the KMT was back in power with its leader Ma Ying-jeou elected as president.

The ROC Constitution of 1946 established a constitutional court known as the Council of Grand Justices (CGJ) of the Judicial Yuan, charged with the task of issuing authoritative interpretations of the Constitution. Following the ROC government’s retreat to Taiwan, the CGJ gradually built up a record of judicial interpretations and, thus, its institutional capacity and judicial authority, as well.\textsuperscript{212} Most of the early judicial interpretations dealt with technical, jurisdictional issues of separation of powers rather than citizens’ rights. Although the CGJ had the power of the constitutional review of laws, regulations, and decrees, it did not exercise this power in practice until 1980.\textsuperscript{213} Before the late 1980s, the CGJ—because of its unimpressive record in dealing with several politically sensitive cases—was not perceived as a strong and independent guardian of constitutional norms and rights. Rather, it was regarded by some as an accomplice of the authoritarian regime, merely adding constitutional legitimacy to the powers-that-be.\textsuperscript{214}

The image of the CGJ began to change for the better in the second half of the 1980s. The CGJ became more activist, readier and more willing to exercise its power of constitutional review of legislative and administrative acts.\textsuperscript{215} In 1990, the CGJ had the opportunity to prove its importance and establish its authority when the question of the reelection of the parliamentary institutions came before it. Most of the members of these institutions were still those elected in mainland China in the late 1940s, whose seats had not been subject to periodic elections because, in theory, the parliamentary institutions still represented the whole of China even though it had not been possible to hold elections in the mainland since 1949. In the celebrated Interpretation No. 261,\textsuperscript{216} the CGJ, in effect, ordered fresh elections in Taiwan for all seats in the parliamentary institutions. After this interpretation, the CGJ has issued many more interpretations on

\begin{itemize}
  \item \textsuperscript{210} See \textit{supra} note 207.
  \item \textsuperscript{211} The major parliamentary institutions included the National Assembly and the Legislative Yuan. The National Assembly has since been abolished by the constitutional amendment of 2005.
  \item \textsuperscript{212} \textit{See, generally}, CHANG WEN-CHEN, \textit{TRANSITION TO DEMOCRACY, CONSTITUTIONALISM AND JUDICIAL ACTIVISM: TAIWAN IN COMPARATIVE CONSTITUTIONAL PERSPECTIVE} (unpublished SJD dissertation, Yale University 2001).
  \item \textsuperscript{213} See Chen, \textit{supra} note 208, at 676.
  \item \textsuperscript{214} \textit{See, e.g.}, Jau-yuan Hwang and Jiunn-rong Yeh, \textit{Taiwan, in ASIA-PACIFIC CONSTITUTIONAL YEARBOOK 1995}, 279 at 282–286 (Cheryl Saunders and Graham Hassall eds., 1997).
  \item \textsuperscript{216} For the CGJ’s interpretations, see the website referred to in \textit{supra} note 209.
\end{itemize}
questions of citizens’ rights and separation of powers that, collectively, have established the CGJ’s reputation as a credible, respected, and activist constitutional court.217

6.2. The Chinese mainland

After defeating the KMT forces, the CCP established the new People’s Republic of China (PRC) in October 1949.218 In the first few years of the regime, China was governed by a provisional constitution known as the “Common Program of the Chinese People’s Political Consultative Conference.” The first constitution of the PRC was adopted by a new National People’s Congress in 1954.219 This constitution was, to a considerable extent, modeled on the 1936 Stalinist constitution of the U.S.S.R.220 The second constitution was enacted in 1975, when the PRC was under the ultraleftist rule that began when Mao Zedong in 1966 launched the “Great Proletarian Cultural Revolution,” which is now recognized as akin to a holocaust for the Chinese people. The third constitution, introduced two years after Mao Zedong’s death in 1976, was a product of the period of transition between the ultraleftist ideology and the new orientation of “socialist modernization” and “reform and opening.” The fourth Constitution, which, subject to several amendments, is still the one in force today, was enacted in 1982 and has since served as the constitutional embodiment of Deng Xiaoping’s ideology of “socialism with Chinese characteristics.”

The 1982 Constitution, drafted using the 1954 constitution as a baseline, sought to improve upon it. The “Four Cardinal Principles,” advocated by Deng Xiaoping, often were referred to as the key ingredients of the guiding ideology behind the 1982 Constitution.221 Deng had stated that adherence to these four principles was essential for the purpose of pursuing China’s economic modernization.222 The four principles are insisting on the socialist path, insisting on the people’s democratic dictatorship, insisting on the CCP’s leadership, and insisting on Marxism-Leninism—Mao Zedong Thought (subsequently revised to include Deng Xiaoping Theory and the idea of the “three represents”223). These principles may be discerned from a passage in the preamble to the 1982 Constitution.224


218 On the history of the PRC, see, generally, the works cited in supra note 198 above.


222 Id. at 73.


224 See the seventh paragraph of the Preamble to the Constitution.
Article 1 of the PRC Constitution states that “The PRC is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the PRC.” The “people’s democratic dictatorship” is a term coined by Mao Zedong to describe the indigenous application of the Marxist concept of “proletarian dictatorship,” which is to be practiced after the socialist revolution overthrows capitalism. The leadership of the working class mentioned in article 1 of the Constitution is an implicit reference to the leadership of the CCP, since, under the Leninist theory of the Communist Party, this party consists of the vanguard of the proletariat and shall exercise leadership on behalf of the proletariat in building the socialist society.

After the 1982 Constitution was enacted, four sets of amendments were introduced, in 1988, 1993, 1999, and 2004, respectively. The amendments reflect the deepening and strengthening of the policy of “reform and opening” and include, for example, the introduction of the following terms and concepts into the Constitution: the preliminary stage of socialism; socialism with Chinese characteristics; the socialist market economy; protecting the private sector of the economy; ruling the country according to law and building a socialist Rechtsstaat (fazhiguojia in Chinese, or a state based on the rule of law); and protecting human rights and private property rights.

Today, the PRC in mainland China is still a one-party state. However, since the Dengist era of “reform and opening,” beginning in the late 1970s, China has moved a long way from a totalitarian communist system, in which the party-state controlled all social and economic domains and all aspects of citizens’ lives, to an authoritarian political system that has committed itself to certain standards of legality. It has fostered the development of a vibrant “socialist market economy” or “socialism with Chinese characteristics,” or what some outside observers have called “capitalism with Chinese characteristics,” which, in turn, has sustained the rapid growth of domains of private and economic life outside the direct control of the party-state.

In theory, the “supreme organ of state power” in the PRC is the National People’s Congress. Members of this congress are elected by the provincial people’s congresses, which are elected by municipal people’s congresses. The municipal people’s congresses are elected by the county-level people’s congresses and these are elected, directly, by the people. In practice, candidatures of the higher-level people’s congresses are determined by CCP organizations, and the National People’s Congress is, largely, a rubber-stamp body under the leadership of the CCP.

In the PRC, the Constitution is implemented, principally, through the making and enforcement of laws. In the era of “reform and opening,” the court system devel-

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225 See Chen, supra note 223, at 44–46.
226 See, e.g., RANDALL PIENNOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002).
228 Constitution of the PRC (1982), art. 57.
opened rapidly in terms of size, caseload, and the educational qualifications and professionalization of judges; however, it is also beset with problems of corruption, political interference in judicial decision making, and ineffectiveness in enforcing court judgments in civil cases. The constitutional function of the Chinese courts is solely to try cases in accordance with the law. They have no role to play in interpreting the Constitution and reviewing the constitutionality of legal norms and administrative actions. In 2001, the Supreme People’s Court’s interpretation in the much-publicized Qi Yuling case seemed to suggest that Chinese courts may apply constitutional provisions directly in adjudicating cases. However, the repeal by the Supreme People’s Court itself of this interpretation in December 2008 signaled that courts are no longer permitted to rely on or refer to provisions of the Constitution in their adjudicative work. In recent years, even the use of the term “constitutionalism” (xianzheng) in publications has been discouraged. Unlike the terms “rule of law” and “human rights,” this term, so far, has never been recognized in official discourse in China. In December 2009, Liu Xiaobo, an activist intellectual who launched the signature campaign for the “Charter 08,” calling for liberal constitutional democracy in China, was convicted of sedition and sentenced to eleven years’ imprisonment.

7. Conclusion

Constitutionalism, as a product of modern Western civilization, was foreign to Asian civilizations. The transplant of constitutionalism and constitutional practices to Asia has occurred in modern times as the superior technological, military, and economic power of the West came to penetrate, control, or challenge different parts of Asia. As the case studies in this article demonstrate, the modern political history of the five


233 See art. 126 of the PRC Constitution (1982).


major Asian countries covered by the present study has been intertwined with ideas, institutions, and practices of Western constitutionalism.

Three sets of political, constitutional, and legal practices relating to constitutions and constitutionalism may be identified: (a) constitutionalism in its classical sense (hereafter referred to as “CC” or “classical constitutionalism”) or constitutionalism properly so called, as defined at the beginning of this article; (b) Leninist-Stalinist forms of rule by a communist party-state legitimized by a written constitution defining the structure of the state and declaring the rights of citizens (hereafter referred to as “PS” or “party-state”); (c) “hybrid constitutional practices” (hereafter referred to as “HC”).238 These last pertain to political systems in which the features of both constitutionalism and authoritarian practices that subvert or are inconsistent with such constitutionalism exist simultaneously. The authoritarian elements may be derived from traditional or indigenous notions, norms, institutions, and long-term political habits, or may exist as a result of deliberate attempts by rulers or ruling elites (whether a one-man dictatorship, one-party hegemony, or military regime) to exert authoritarian rule behind a façade of liberal democratic constitutional forms. Such authoritarian goals might be pursued, for example, by manipulating electoral and other constitutional processes, violating human rights guaranteed by the constitution, or otherwise denying opposition forces the opportunities to compete for political power on a level playing field in accordance with the constitution. However, unlike communist regimes, authoritarian or semidemocratic regimes that exhibit such hybrid constitutional practices do not control all major social and economic domains, and a certain degree of social and political pluralism exists side-by-side with authoritarian rule in such regimes.

Based on these three sets of political, constitutional, and legal practices, the pathways of constitutional development or the constitutional history of the countries and jurisdictions covered by this article may be represented as follows.

<table>
<thead>
<tr>
<th></th>
<th>Prewar</th>
<th>Postwar</th>
<th>1987–90s</th>
<th>2000s</th>
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</thead>
<tbody>
<tr>
<td>China</td>
<td>HC</td>
<td>PS</td>
<td>PS</td>
<td>PS</td>
</tr>
<tr>
<td>Taiwan</td>
<td>HC</td>
<td>CC</td>
<td>CC</td>
<td>CC</td>
</tr>
<tr>
<td>Japan</td>
<td>HC</td>
<td>CC</td>
<td>CC</td>
<td>CC</td>
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<tr>
<td>South Korea</td>
<td>HC</td>
<td>CC</td>
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<tr>
<td>North Korea</td>
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<td>Indonesia</td>
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<tr>
<td>India</td>
<td>CC</td>
<td>CC</td>
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238 This concept of “hybrid constitutional practices” is analogous to that of “hybrid regimes”: see Larry Diamond, *Thinking about Hybrid Regimes*, 13(2) *Journal of Democracy* 21 (2002).
The countries and jurisdictions concerned may be classified according to the following categories on the basis of their pathways of constitutional development or the historical trajectories of their political, constitutional, and legal practices:

<table>
<thead>
<tr>
<th>Category I</th>
<th>Country that has practiced CC since it was founded</th>
<th>India (1949–)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category II</td>
<td>Countries that have undergone a transition from HC to CC (crucial year of transition in brackets)</td>
<td>Japan (1946); South Korea (1987); Republic of China (Taiwan) (1987); Indonesia (1998)</td>
</tr>
<tr>
<td>Category III</td>
<td>Countries that have practiced PS since they were founded</td>
<td>People’s Republic of China (1949–); North Korea (1948–)</td>
</tr>
</tbody>
</table>

We may now consider and compare the various avenues of constitutional development in the countries and jurisdictions concerned, using a largely chronological approach. We begin with the cases of China and Japan, the only independent countries (among those covered by this study) before the end of World War II. Japan was the first Asian country to adopt the Western constitutional form. The Meiji constitution of 1889 exemplified the concept of HC, as formulated above. It combined elements of Western constitutionalism with indigenous Japanese ideas and institutions, particularly in its treatment of the supreme status and authority of the divine emperor. The liberal democratic features of the constitution actually were practiced in the first decades of the twentieth century but were superseded subsequently by authoritarian military rule in the name of the emperor, which ended only with Japan’s defeat at the end of World War II. As Beer points out: “It does not seem probable that Japan would soon have become a constitutional democracy without the shock of losing the Pacific War and without massive Occupation support for Japan’s liberal forces.”

As was the case in Japan, China also practiced a kind of HC in the first half of the twentieth century. China, at end of the Qing dynasty, was on the verge of introducing a constitutional monarchy but became a republic immediately after the 1911 revolution. Experiments with Western-style liberal constitutional democracy in the early years of the republic were a failure. Sun Yat-sen developed the three-stage doctrine of military government, political tutelage, and finally constitutionalism. The KMT regime attempted to put this into practice, and the enactment of the 1946 Constitution was supposed to begin the era of constitutionalism. This Constitution was actually liberal democratic in orientation, although it never had the chance of being implemented on the Chinese mainland, as the civil war soon drove the KMT to Taiwan.

In response to the challenges of the West, both Japan and China sought to modernize by introducing Western constitutional forms. The “defective democracy”\textsuperscript{240} of the Meiji constitution ultimately ended in militarism. Warlordism in China in the 1910s and ’20s and Japanese aggression in China in the 1930s and ’40s, together with the intermittent civil war between the KMT regime and the Chinese Communists, made it impossible for Sun Yat-sen’s goal of constitutionalism to materialize. Thus, by the time World War II ended in 1945, the prospects for constitutionalism in both China and Japan were very uncertain.

The end of World War II opened new chapters in the constitutional history of China and Japan; it gave rise, as well, to the newly independent states of India, Indonesia, South Korea, and North Korea. The victory of communism in mainland China and North Korea led to Leninist-Stalinist party-states being established in these countries, where the PS has survived up to this day, despite the market-oriented economic reforms that have been particularly successful in China. A new system of CC was created in Japan during the American-led Allied occupation at the end of World War II, which in the course of the next six decades turned out to be a success story of CC in Asia. At the same time, South Korea, under the influence of the U.S., also enacted a constitution with liberal-democratic features, which was amended several times and used to sustain various forms of HC in the next four decades.

In Indonesia, the first constitution of 1945 may be regarded as being of the HC mode, given the integralist philosophy of its principal draftsman and the Pancasila ideology. In the 1950s, there was a brief attempt to practice liberal constitutional democracy that ended in failure. Indonesia under Sukarno’s Guided Democracy and, subsequently, Suharto’s New Order may be regarded as forms of HC.

In India, the Constitution of 1949 is clearly a constitution exhibiting all the relevant features of CC. Despite the heterogeneity of its population, the ethnic, linguistic, religious, and caste tensions that have long existed, and the widespread poverty and the mass illiteracy, India has, in the course of the last six decades, proved to be a stronghold of CC in Asia. Thus, Japan and India, both with sixty years of democratic constitutional practice behind them, are now the longest surviving practitioners of CC in Asia. Yet it is interesting to note the significant differences in their constitutional experience. While the founding fathers of the Indian Constitution, building on the imported British tradition of the rule of law and representative government, chose voluntarily to adopt Western-style liberal democratic constitutionalism, Japan’s 1946 Constitution was largely a foreign imposition even though the Americans sought to build on the democratic constitutional experience of the Japanese in the first decades of the twentieth century. Whereas Japan is highly homogeneous, India is highly heterogeneous; whereas the Japanese 1946 Constitution is short and simple, the Indian Constitution is extremely long and complex. While the Japanese Constitution remains unchanged

since 1946, the Indian Constitution has been amended over a hundred times. India has a complex federal structure; Japan has none. India’s Supreme Court is activist and, indeed, world famous for its innovations, while Japan’s Supreme Court is well-known for its conservatism and judicial restraint. Yet CC has flourished in both countries, thus demonstrating the flexibility and adaptability of CC in diverse Asian circumstances.

In the 1960s and ’70s, when forms of HC and authoritarian rule were practiced in South Korea, Taiwan, and Indonesia, it looked as if there did exist, if fact, an Asian mode of constitutionalism or political-constitutional practice that was distinct from Western constitutionalism. Such Asian political-constitutional practice seemed to be informed by Asian culture and values, including Confucianism and communitarianism, and to consist of a mixture of Western constitutional forms and indigenous ideas and practices that inclined toward authoritarianism and personal, party, or military domination. The constitutions of these states contained some features of constitutionalism and liberal democracy; still, the constitutional institutions and processes were used by authoritarian rulers (Park, the two Chiangs, Sukarno and Suharto) as façades and as a means to confer legitimacy on their regimes and to express their national identity. Sukarno defended his undemocratic practice with his concept of “Guided Democracy”—an Indonesian rather than Western style of democracy; Park, with the notion of “Korean-style democracy”; and the Chiangs, by drawing on Confucian tradition and relying on the idea that the ROC regime in Taiwan was the legitimate government for the whole of China, even though it was impossible to hold nationwide elections to the regime’s parliamentary bodies. Rapid economic growth in South Korea under Park, in Taiwan under the KMT, and in Indonesia under Suharto contributed to the regimes’ legitimacy as “developmental states.”

However, with the democratic transition and consolidation of constitutionalism (CC) in South Korea and Taiwan (beginning in both cases, in the late 1980s, as part of the “Third Wave” of democracy) and in Indonesia (in the last decade), the idea that there exists a distinctly Asian form of constitutionalism or political-constitutional practice may be regarded as bankrupt. In retrospect, the HC systems once practiced in these states, which seemed to bear specifically Asian characteristics, were no more than the earlier or transitional phase of a historical trajectory toward constitutionalism—a phase in which political practices failed to conform to the promises of liberty and democracy in the constitutional texts. It is also noteworthy that in South Korea, Taiwan, and Indonesia the transitions from HC to CC have been largely peaceful, at least in the sense of an absence of violent revolutions, though there have been large-scale demonstrations and civil unrest in South Korea and Indonesia at the moments of transition. In addition, constitutional continuity has been maintained by the introduction of constitutional amendments by bodies that had legitimate authority under the existing constitutions. The case of Indonesia is particularly instructive, as the degree of success in the establishment of constitutionalism in this relatively poor and
heterogeneous country could not have been predicted, easily, ten years ago. The instances of South Korea, Taiwan, and Indonesia suggest that constitutionalism can be compatible with both Confucian and Muslim cultures and values and with different levels of economic development.

The PS/CC contrast between North and South Korea and between the PRC in mainland China and the ROC in Taiwan suggests that whether constitutionalism (or CC) eventually triumphs in a particular jurisdiction is determined more by politics and the contingency of historical events, such as wars, than by culture and values. Unlike the situation in Eastern Europe and the former Soviet Union, there is—with the exception of Mongolia, which had been under Soviet influence—no case of a transition, or even signs of one, from party-state to constitutionalism in Asia or, at least, not in the cases of the PRC and North Korea. However, it is noteworthy that insofar as the PS practiced in these states was basically an import from the former Soviet Union, the persistence of PS in China and North Korea does not constitute evidence that there is a distinctly Asian mode of political and constitutional practice.

This survey of the constitutional development in five major Asian nations provides some ground for cautious optimism regarding the prospects of constitutionalism in Asia and its adaptability to Asian soil. Constitutionalism, albeit originating in the Western world, seems to have a universal appeal and to address the fundamental problems of governance, government, and political power in many modern societies in Asia. A macrohistorical perspective, covering developments in Asia since the late nineteenth century, suggests that constitutionalism has broadened and deepened its reach, significantly, over the course of time. India and postwar Japan have proved to be strongholds of constitutionalism in Asia. South Korea, Taiwan, and Indonesia have witnessed transitions from hybrid constitutional practices to constitutionalism. No distinctly Asian mode of constitutionalism or political-constitutional practices can be identified. Nor is there evidence that Asian culture and values are particularly resistant to constitutionalism.

The examples of a divided China and divided Korea are particularly instructive in demonstrating that the same people and culture—as a result of wars, foreign interventions, and other historical contingencies—may be bifurcated into states that practice and do not practice constitutionalism, respectively. It remains to be seen whether the party-states in the PRC and North Korea will follow, eventually, the paths pioneered by Taiwan and South Korea and move, either of their own volition or as the result of domestic or international pressure, toward a transition to constitutionalism. Given the successful economic reforms and progress—albeit limited—toward the rule of law that have taken place since the era of “reform and opening” began three decades ago in the PRC, and given that the sociopolitical and economic systems in South Korea, clearly, have proved to be superior to their North Korean counterparts, this does not seem to be an impossible dream.