

# Constitutional Politics in Southeast Asia: From Contestation to Constitutionalism?

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*Over the last twenty-five years the constitutional landscape of Southeast Asia has changed tremendously. As in the rest of the world, states in the region are dramatically altering their constitutions, often putting in place institutional safeguards for individual rights, such as constitutional courts and human rights commissions. Yet despite the numerous formal changes, actual constitutional practice in the region has been highly uneven. Four areas are particularly contested: constitutional drafting and design; individual and religious rights; the role of the military in constitutional politics; and the rule of law, courts and justice. How states in Southeast Asia resolve unfolding conflicts in these four areas will be critical to how constitutionalism evolves in the region. Replacing traditional legal scholarship with a new perspective on how constitutional politics are contested in the region, this article seeks to advance the scholarly debate by delving deeply into the dynamics that underpin unfolding constitutionalism trajectories and assessing whether countries in the region are actually deepening constitutional practice in a Western liberal sense or whether the model that seems to be emerging is quite different.*

**Keywords:** constitutionalism, Southeast Asia, contestation, politics, rights.

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Constitutional politics has once again taken centre stage in Southeast Asia. In Thailand, the constitutional reform debates that dominate the political agenda often fuel the divisions in a polity that is not only increasingly polarized but also increasingly violent. In Malaysia, recent court decisions on religious freedom have tested the constitutional boundaries of the multi-ethnic religious state. In the Philippines and Indonesia there is growing tension between the executive and judicial branches as the political role of courts expands. Meanwhile, the Burmese are debating how the traditional military elites can be accommodated in a new constitutional framework — not unlike efforts in Timor-Leste to accommodate diverse elite interests within the constitution. Less visibly, in Vietnam and Laos latent conflict over land as well as ethnic and religious minority rights has led to renewed calls to amend the constitution. In short, in Southeast Asia constitutional politics is generating growing social dissension.

Perhaps this should not be surprising. Over the last twenty-five years, in a worldwide context of liberalization, globalization and democratization, Southeast Asian states have dramatically altered constitutions, amplified human rights provisions, and put in place institutional safeguards for those rights, such as constitutional courts and human rights commissions.<sup>1</sup> Even less-than-democratic regimes have at least to some degree been reinforcing courts and expanding provision for the rule of law. As Albert Chen has noted, “constitutionalism has significantly broadened and deepened its reach in Asia in modern and contemporary times”.<sup>2</sup>

Yet constitutional trajectories and realities in Southeast Asia are hardly clear-cut. As one might expect, given the marked diversity within the region in terms of colonial history (British, Spanish, French, Dutch); religion (Christianity, Islam, Buddhism, Hinduism); and, above all, political regimes (democratic, semi-authoritarian, authoritarian), not only do constitutional practices differ substantially but the very notion of liberal Western constitutionalism is regularly and deeply contested.<sup>3</sup> Indeed, the region is deeply engulfed in legacies of what an African commentator has called “constitutions without constitutionalism”.<sup>4</sup> Though they may gradually be eroding, the barriers to a more intense constitutional practice in Southeast Asia are still considerable. The military still regularly intervenes in politics; abuses of human rights and liberties continue; and citizens struggle with the extent of the rule of law, judicial review and notions of justice.<sup>5</sup>

Constitutional politics is increasingly the focal point for collective action by both elites and ordinary citizens. This remarkable shift raises serious questions: for instance, who are the actors, and what are the real issues? How do the arguments affect constitutional practice and progress towards more normative constitutionalism? How are states in the region addressing the new constitutional fault lines? Finally, how can developments in Southeast Asia inform the global scholarly debate about constitutions and politics? To clarify we define constitutions as written or unwritten fundamental principles or established precedents according to which a country or state is governed. Constitutionalism is defined here more broadly as adherence to key institutional features of restraint, such as separation of powers, checks and balances, the rule of law, and constitutional judicial review and human rights. The phrase constitutional politics is used to capture the process of debate, contestation and struggles between social actors associated with constitutional rules and processes, and constitutional practice extends the legal and institutional analysis to the realities of constitutional behaviour that can be observed daily.<sup>6</sup>

Current scholarship has analysed such questions predominantly through the lens of legal and socio-legal scholarship, though political scientists have also offered their views. For instance, legal scholars have sought to identify typologies of constitutional patterns derived from previous scholarships<sup>7</sup> while highlighting path dependencies (e.g., wars, revolutions, colonial legacies) that have made it harder for constitutionalism to gain traction in the region.<sup>8</sup> Others have begun to apply standard constitutional theories to the region, contemplating socioeconomic preconditions for constitutionalism and defining trigger points that may enable courts to uphold the constitutional framework.<sup>9</sup> These studies have been complemented by socio-legal work on new courts (constitutional and administrative) throughout Asia,<sup>10</sup> the judicialization of politics in Southeast Asia,<sup>11</sup> and reflections on such individual constitutional issues as emergency powers<sup>12</sup> and rule of law nuances.<sup>13</sup> Meanwhile, political scientists have been talking about aspects of constitutional engineering for more than a decade, and about the consequences of constitutional design choices for such political regimes in terms of stability, political representation and party systems.<sup>14</sup> Most recently, scholars have expanded the discussion to authoritarian regimes; the constitutional nexus is that authoritarian rulers have a vital interest in writing constitutions because they can ensure survival of the regime by

helping to control or coordinate the actions of diverse constitutional and administrative bodies.<sup>15</sup>

What is beginning to emerge from all these studies is a comprehensive picture of the constitutional landscape in the region that has both empirical and theoretical dimensions. Yet, seen with these new perspectives, it is difficult to identify the specific dynamics that propel states towards deeper constitutional practice. It may be that commentators have shied away from an explicit focus on the underlying political dynamics, particularly the sometimes confrontational negotiations of social forces arguing over constitutional issues.

We propose here to look at constitutional practice in Southeast Asia through the distinctly political lens of contestation in order to put the politics from which constitutions emerge at centre stage. By drawing attention to four areas where viewpoints regularly differ regarding what constitutions should stand for — constitutional drafting; individual and religious rights; the place of the military; and the rule of law, courts, and justice — we argue that how states in Southeast Asia resolve the related conflicts will be critical to the future of constitutionalism in the region.

What is central to this effort is the dynamics of constitutional contestation itself — the process by which incumbent elites compete, bargain and struggle with oppositional groups (e.g., students, members of civil society organizations, disenfranchised elites etc.) about what state institutions and the broader political order should look like, what rights should be granted, how these should be enforced and particularly by whom. For constitutionalism to take hold, clearly it will take more than institutional change on paper. Instead, elites and regular citizens alike must come to agreement to support such basic features such as the separation of powers, checks and balances, judicial review and specified rights. Such “constitutional settlements”, born out of contestation and struggles, are critical to whether constitutional principles are adhered to and enforced. By drawing attention to continuing constitutional flashpoints and how some have been transformed, we seek to provide new insights, both empirical and conceptual, into the potential that constitutionalism will deepen in Southeast Asia.

To illustrate the argument, the article is structured as follows: first, as context for our argument, we briefly discuss some current debates about constitutional practice in Southeast Asia. We then turn attention to the four areas of contestation — constitutional drafting and design; individual and religious rights; the role of the military in constitutional politics; and the rule of law, courts and

justice — that we consider to be of critical importance to the future of constitutionalism. The case study chapters in this special issue then explore these areas more fully. The article concludes with reflections on the future of constitutionalism in Southeast Asia and how current developments might inform that future.

### Making Sense of Southeast Asia’s Constitutional Landscape

In the context of democratization, liberalization and growing integration of world economies, in over the past two decades almost all Southeast Asian states have comprehensively altered their constitutions (see Table 1). For the most part, the new constitutions replaced those drafted as part of the colonial handover, or its revolutionary aftermath.<sup>16</sup> Even where it seems the same constitutions have been in place since independence — as in Malaysia, Singapore and Brunei — they have repeatedly been amended.<sup>17</sup> Despite the diversity of their features, scope, and ambition, constitutions have thus been both central to Southeast Asia’s modern state-building and responsive to rapid change.

Table 1  
Constitutions in Southeast Asia

Country	Year of the First Constitution	Number of Constitutions 1898–2014	Latest Revision or Full Redraft
Brunei	1959	1	2004
Cambodia	1947	5	1999
East Timor	2002	1	—
Indonesia	1945	4	1999, 2000, 2001, 2002
Laos	1947	2	2003
Malaysia	1957	1	*
Myanmar	1947	3	2008
Philippines	1898	6	1987
Singapore	1959	1	*
Thailand	1932	18	2007
Vietnam	1946	4	2001, 2013

Note: \* Constant revision.

Source: Kevin Y.L. Tan, “The Making and Remaking of Constitutions in Southeast Asia: An Overview”, *Singapore Journal of International & Comparative Law* 6 (2002): 1–41; Claus Peter Hill and Jörg Menzel, eds., *Constitutionalism in Southeast Asia*, vol. 3 (Singapore: Konrad Adenauer Stiftung, 2006), pp. 9–32; Graham Hassall and Cheryl Saunders, *Asia Pacific Constitutional Systems* (Cambridge: Cambridge University Press, 2007).

But has concern for the constitutional document actually deepened constitutional practice? Consider Thailand: its volatile history of eighteen constitutions since 1945 is a vivid reminder that constitutions in Southeast Asia have been used to legitimize a variety of regimes, some of them deeply constitutional and some not at all. The formal document alone cannot constrain, control and regulate the exercise of power, ensure protection of fundamental rights, or prevent arbitrary use of power. Even where the document was very thoughtfully drafted, features generally thought to be central to a modern constitution are not always put into practice and thus may not be able to prevent continuing patterns of executive dominance, military interventions, and human rights abuses, not to mention withstand ideological challenges.

It is unquestionably difficult for regional observers to make sense of current constitutional diversity and capture the divergence between formal constitutions and actual practice.<sup>18</sup> Many authors have turned to classic typologies to describe the constitutional landscape in Southeast Asia. Particularly dominant here has been Karl Lowenstein's famous tripartite classification of normative, nominal and semantic constitutions.<sup>19</sup> For him, the first describes "a living constitution, one that is real and effective and faithfully observed, actually governing the dynamics of the power process" but a nominal constitution is one "not lived in practice because socio-economic conditions mitigate against it" and a semantic one may be "fully applied and activated, but its ontological reality is nothing but the formalization of the existing location of political power for the exclusive benefit of the actual power holders".<sup>20</sup> In 1962 Giovanni Sartori expressed a very similar notion in describing "*garantiste*", "nominal" or "façade" constitutions,<sup>21</sup> as did Chen in 2012 in his descriptions of "liberal", "communist/socialist" and "hybrid" constitutions in Asia.<sup>22</sup>

Probably most constitutions (and states) in Southeast Asia can probably best be classified as hybrids. To be sure, there are absolutist states like sultanist Brunei, and until very recently the military-ruled Myanmar; their constitutions might be classified as semantic. At the other extreme, constitutional practices in Indonesia and the Philippines occasionally come close to the normative ideal. But for the most part Southeast Asian states are still deeply entrenched in hybrid-nominal constitutional practices.<sup>23</sup> Sometimes, this is for ideological reasons, as in socialist Laos and Vietnam; in others, practice falls short of consistently ensuring key features of the constitutional compact, as in Thailand, Malaysia, Singapore,

Timor-Leste and Cambodia. The uneven track record of the courts in upholding the supremacy of law in the region is surely a critical factor in this, though hardly the only one.<sup>24</sup> In fact, over time, there has been considerable movement from semantic (façade) constitutional practices to more hybrid types if not the beginnings of true normative constitutional practice, but because these outcomes are fragile, they fall well short of Western constitutional practice.<sup>25</sup>

Standard contemporary constitutional theories have rarely been debated in the context of Southeast Asia. For instance, states in the region are rarely the subject of arguments between legal constitutionalists, who see courts as the principal guardians of the constitutional order, and political constitutionalists, who see political institutions, such as parliaments, as the proper locus of constitutional constraint.<sup>26</sup> The same holds true for debates about the potential for transformation of existing constitutional patterns in the region, which have often been assigned to vague notions of political and social preconditions.<sup>27</sup>

A notable exception here has been the attempt to identify constitutional “tipping points” — such as popular dissatisfaction with the status quo, a solid legal infrastructure and an alternative set of legal and political norms that are minimally threatening to the political elite<sup>28</sup> — but the only application of this theoretical debate so far has been to the courts, an institution that can hardly be understood in isolation from the entire constitutional context.

What is needed for Southeast Asia is a more comprehensive view of transformative constitutional dynamics. Although international dynamics (e.g., diffusion of constitutional models and their convergence) might be a factor, ultimately, the prevailing dynamics must be domestic, given the distinct relationship of a constitution to the state for which it was created.<sup>29</sup> More importantly, constitutional dynamics are ultimately political and intimately related to power struggles. This notion is embedded in Lowenstein’s dictum that a “constitution is what power holders and power addresses make of it in practical application”.<sup>30</sup> Other scholars have similarly described constitutions as “power maps” embodying broad political settlements between elite groups.<sup>31</sup> And reflective of the experience of constitutionalism in Europe, scholars have also been quick to point out that if constitutionalism is to gain hold in the region, “political struggles will be needed to establish the conditions in which the legal order can flourish”.<sup>32</sup> As Chen points out, in fact the dynamics of change are often linked to specific areas of

contestation, areas that have the potential to be transformative for constitutional practice.<sup>33</sup>

It is thus within this broader debate that we draw attention to areas of constitutional politics that have become flashpoints in the region: constitutional drafting and design, an arena where interests have clashed over both drafting dynamics and constitutional design choices (the rules of the political game); human rights (individual, collective and religious) an area that critically shapes the nature of state-society relations; the role of the military (part of the question of how to tame extra-constitutional actors); and judiciaries, courts and the rule of law (to what extent should courts be guardians of the constitutional order and thus enforce the primacy of law over politics). How conflict plays out in these areas, we argue, will critically shape constitutional practice in the region.

### **Crafting Constitutionalism: Four Contested Areas**

Each of the four areas we have identified has become a flashpoint for growing contestation in the region as aspirations grow and struggles for constitutionalism deepen.

#### *Constitutional Drafting and Design*

Since 1980, constitution-making has become one of the most visible arenas for contestation. Contested here have been both the process itself and the content of the constitutional document. The two are, of course, closely related: the process is critical to the legitimacy of the document, and the interests it represents influence the ultimate content.<sup>34</sup> In fact, when a constitution is redrafted, how to organize the process, from selection of drafters to final approval, has generally aroused considerable debate. For instance, the 1986 Philippines “Freedom Constitution” — which was drafted by a commission of forty-six drafters appointed by the president — was criticized early on for its elitist, if not conservative, content.<sup>35</sup> Similarly, Indonesia’s incremental amendment process (1999–2002), dominated by members of parliament, was heavily criticized by civil society actors, who were only minimally consulted.<sup>36</sup> Even in Thailand, where the 1997 constitutional reform was undertaken by a group of ninety-nine drafters, a mix of appointed academics and elected provincial delegates, and incorporated considerable public consultation and engagement with civil society, questions were raised about the composition of the drafting group, the sincerity

of the public outreach, and the behind-the-scenes influence of monarchical networks.<sup>37</sup>

Not surprisingly, such questions have been put forward even more vigorously where the process was heavily orchestrated by the military, as in Thailand (2007) and Myanmar (2008), approval by public referendum notwithstanding.<sup>38</sup> And while constitutional change has been less participatory and transparent in socialist (Laos 2003; Vietnam 2001, 2013), monarchical (Brunei 2004), and one-party-dominated states (Malaysia and Singapore) — in all of which change has been regular and incremental because amendments are easily passed — debate on social networks and in the blogosphere makes it clear that the change process can still be contested vigorously.

However, while the process can be critical to the legitimacy of the document, more often it is the content that triggers intense public debate and even social action. This is not surprising. Many of the new constitutions introduced comprehensive change, such as new agencies of horizontal accountability (e.g., constitutional courts, human rights commissions, ombudsman offices); expanded individual and collective rights; and restructured (decentralized) state functions and the electoral process. These are all matters at the heart of how political power is organized. In Indonesia questions about the role of the military, the Jakarta Charter, direct election of the president, and the extent of the revisions to the 1945 Constitution were all hotly contested, occasionally to the brink of deadlock.<sup>39</sup> During the 1997 drafting process in Thailand, debates about the composition of the senate, qualifications for MPs, and the role of Buddhism all animated vociferous discussion and even public protest;<sup>40</sup> so did the quotas reserved for the military in Myanmar's legislative assembly in 2008, and the executive-led efforts in the Philippines to change the constitution from a presidential to a parliamentary system.<sup>41</sup> Public debate continues over the actual meaning of the "law-governed socialist state" phrasing in the 2001 amendments in Vietnam, debates fuelled by growing discontent over both land issues and the state's treatment of ethnic and religious minorities.<sup>42</sup>

Perhaps above all it is the frequent mismatch in the region between ambitious constitutional wording and what happens after it is passed that has generated scepticism and thus debate about constitutional change. Again, consider the Philippines, where liberal features and an ambitious socioeconomic rights agenda in the constitution have been accompanied by executive abuse, extra-constitutional threats, and lagging economic and social performance.

Indeed, constitutional reform debates have been alive there for almost twenty years.<sup>43</sup> But, more than anywhere else in the region, it is surely in Thailand that constitutional debates have been central to social contestation in recent times. There, electoral promises by Prime Minister Yingluck Shinawatra to amend the military-imposed 2007 constitution (with the goal of returning more closely to the 1997 version) and put it to a public referendum have not only been met by challenges in the Constitutional Court but have also directly fuelled violent public protests seeking to oust her and suggest a very different constitutional model that is opposed equally strenuously by the red shirt movement still faithful to her brother, ousted Prime Minister Thaksin Shinawatra.<sup>44</sup> The old pattern of intra-elite contestation between military and bureaucratic actors has disappeared beneath the battle of new and old elites, and the confrontation has become so polarized that it seems unbridgeable.

Thailand is a particularly vivid illustration of the rapidly changing constitutional environment in Southeast Asia, where new social actors not only question previous elite arrangements but also seek to be accommodated by the constitution. Given ever-more-detailed constitutional documents, some of which come with policy prescriptions and distributional ramifications, constitutional reform is likely to continue to be a contested issue in the region for the foreseeable future. How states manage this process will be critical to how constitutionalism evolves in the region.

### *Human Rights*

Human rights, particularly the extent to which individual, collective and religious rights are respected and enforced, are another substantial bone of contention. They are in fact critical to shaping the relationship of the individual to the state, and thus broader state-society relations, and it is here that progress has been particularly uneven.

To be sure, all the states in the region except Brunei have adopted constitutional rights “catalogues”, many of which have greatly expanded political, social, and economic rights. All members of the Association of Southeast Asian Nations (ASEAN) have also ratified at least two of the six major human rights treaties, which suggests a willingness to buy into the global human rights system.<sup>45</sup> And yet, as too often illustrated by, for example, extrajudicial killings, constraints on political activities, and failure to ensure the rights

of religious and ethnic minorities, the reality has often been starkly different from the constitutional ideals.<sup>46</sup>

Authoritarian and semi-authoritarian regimes cite security and public order to justify the constraints on human rights. For instance, the regular use of Internal Security Acts has considerably suppressed expression of human and political rights, as members of the opposition in Singapore and Malaysia know well.<sup>47</sup> Meanwhile, Thailand has increasingly used its *lèse-majesté* law to rein in critics of the arrangements of the old elites.<sup>48</sup> And in Malaysia, with Islamization growing, a highly polarizing government and court decisions on religious rights have also highlighted heavier constraints on the right to choose, leave and exercise a religion.<sup>49</sup> Similarly, failures to protect religious minorities, such as the Ahmadiyya community in Indonesia or the Rohingyas in Myanmar, have illuminated practical constraints that religious minority groups face in exercising their faith.<sup>50</sup>

The broader human rights picture is hardly much better. For instance, as international human right reports regularly stress, areas like Mindanao, West Papua, and parts of Myanmar are effectively beyond the reach of law and thus formal justice. There, extrajudicial killings, torture and violence against minorities are widespread, often with the implicit support of the security forces, who illustrate the sense of impunity of those in power. Extrajudicial killings in the Philippines are well-documented, particularly against members of the political left.<sup>51</sup> In Indonesia security forces have also been able to operate almost with impunity, as illustrated in the abuses committed in East Timor or Papua.<sup>52</sup> Similarly, during the 2003 “war on drugs” under the Thaksin government in Thailand, human rights abuses were far-reaching (though at times with the implicit support of the public), and abuses by the security apparatus also seem to have fuelled political violence in Thailand’s southern provinces.<sup>53</sup>

Such failures to consistently uphold the rights regime, domestic or international, also illuminate the general weakness of the justice institutions that should be supporting it. Not unlike the formal courts themselves, new human rights commissions and ombudsman offices have generally been reluctant to hold the executive branch and its security apparatus accountable for human rights violations. It may also be that given authoritarian legacies in many developing states, citizens themselves are still somewhat ambivalent about how far rule of law principles and rights should prevail against state interests.<sup>54</sup> However, growing networks of lawyers and civil society

groups are increasingly challenging half-hearted rights enforcement. These not only lend critical support to judicial and quasi-judicial institutions but also help to constitutionalize public debate and legalize state-society relations beyond the constitutional realm, particularly in areas of civil liberties.<sup>55</sup> How the battle over rights unfolds will be deeply important to the fate of constitutionalism in Southeast Asia.

### *The Military and Constitutional Politics*

As the traditional political veto player in the region, what the military does is of critical importance to how far constitutionalism emerges, because only if its members accept the supremacy of (elected) politicians and their constitutionally enshrined decision-making authority can constitutionalism really gain ground. It is surely not surprising that such settlements have been difficult to achieve in countries where the military was a major factor in gaining or maintaining independence or where prolonged periods of military rule have left the military far more powerful than civilian institutions, as in Myanmar, Indonesia, Vietnam and Thailand. The point is underscored by the fact that where this has not been the case, militaries have not had much lasting impact on either the constitution or the regime.<sup>56</sup>

At present, no country in Southeast Asia is ruled directly by the military or is without a constitution. Even in Myanmar, although the military is still dominating behind the scenes, it has formally withdrawn from the apex of power after ruling by decree for nearly twenty years.<sup>57</sup> It can also be acknowledged that military coups, and with them disruptions of the constitutional order, have become relatively rare. In fact, Thailand is the only country in the region where there has been a dominant pattern of coups, making the negative effects of the military on constitutionalism painfully clear.<sup>58</sup>

The situation is considerably more benign in Indonesia, where compromise between military and social forces has paved the way to a broadening of constitutionalism. Once a defining force in Indonesian politics as the pillar of the Soeharto regime that enjoyed significant prerogatives, the military, since democratization in 1998, has gradually lost much of its hegemonic position. Constitutional amendments since 2004 have ended military representations in parliaments and active military members may no longer hold cabinet positions, making space for civilian institutions to mature.<sup>59</sup> As a

result, constitutionalism and democracy have deepened in Indonesia, though the military has still not been held accountable for human rights violations in West Papua.<sup>60</sup>

In a number of other states in the region, however, the military has taken on a distinct political role that has prevented constitutionalism from truly taking root. The Myanmar military has only recently started to allow discussions on constitutional amendments that might eventually reduce its own political role. In March 2013, members of the military-backed Union Solidarity and Development Party (USDP) submitted a proposal that led to the establishment of the Joint Committee for Reviewing the Constitution (JCRC). The committee, dominated by the USDP (52 members) and military representatives (25 members), may open up an opportunity for a constitutional settlement with the oppositional groups represented by the NLD (7 members) and 25 members of the ethnic parties.<sup>61</sup> This may be a remarkable breakthrough, considering that the former military regime spent eighteen years drafting a constitution that totally reflected the military worldview and gave it a leading role in political affairs. The whole drafting process was “marred by a lack of inclusiveness, heavy restrictions on public debate and little input by the participants in the final product”.<sup>62</sup> The 2008 Constitution guarantees a role for the military in politics and reserves for representatives of the military 25 per cent of the seats in local and national parliaments and certain positions in the most important ministries. It also gives them impunity for past human rights violations. Moreover, it allows them a veto over constitutional change, since the constitution can only be changed with a quorum of 75 per cent and a public referendum. Thus, the process of military withdrawal and constitutional settlement is only at a very early stage; it may well be that the debate on constitutional reforms is only a ploy to appease the international community.

Then there is the Thai military. After staying in its barracks for more than ten years, it has chosen to re-enter politics, a move with considerable consequences for Thailand’s nascent constitutionalism. In the first military coup since 1991, the military ousted elected Prime Minister Thaksin in 2006, abrogated the constitution and drafted an interim document to legitimize the coup. It also allowed them to heavily influence the Constitutional Drafting Assembly that put together the new 2007 Constitution, a process limited to the elite and carefully selected representatives of civil society and the middle class.<sup>63</sup> Not surprisingly, the 2007 Constitution — which gave the

military a guardian role over politics — was heavily criticized by opposition parties, the emerging red shirts movements, academics and intellectuals, and thus succeeded only in creating divisions within Thai society between traditional power circles of the palace and bureaucracy and the new social forces that Thaksin had brought into play. The ensuing seven years of polarization, political manoeuvres and violent street politics make it obvious that there is as yet no viable constitutional settlement.

### *Rule of Law, Courts and Justice*

Both the rule of law and the role of the judiciary have had a chequered history in Southeast Asia.<sup>64</sup> Recent constitutional changes, many of which greatly empowered courts, have returned them to centre stage, generally as part of a general process of “judicialization of politics” in Southeast Asia.<sup>65</sup> Yet, with conflict growing over the appropriate role of courts in obviously political matters and persistent legacies of using the law principally in support of traditional holders of political power, both areas have become central to constitutional contestation in the region, with far-reaching consequences for constitutional practice.

Constitutional reforms have been a major impetus behind these developments. For instance, starting with the empowerment of the Philippines Supreme Court by the 1986 Constitution, most reforms have reinforced the independence and powers of the judicial branch, such as the creation of high-profile constitutional courts in Thailand (1997) and Indonesia (2003), and the related Constitutional Council in Cambodia (1998) and the Constitutional Tribunal in Myanmar (2011).<sup>66</sup> Combined with powers to uphold the new rights provisions and to intervene in high-level political conflict (e.g., impeachment, electoral disputes and executive prerogatives), these new courts have become central players in the evolving constitutional landscape. Even in Vietnam, where the 1992/2001 constitutional reforms affirmed both property and human rights, there is now talk of creating a constitutional court that would replace the current constitutional council.<sup>67</sup> In short, within a dramatically transformed constitutional landscape, judicial actors have become critical to how constitutional practice is evolving in the region.

There are signs that judicial assertiveness has been growing, but courts in the region have highly uneven records. For instance, while the judicial activism of the Philippines Supreme Court has been well-documented, practices of extra-constitutional ouster

(“people power”) and accusations of corruption and politicization of the court system indicate continuing weaknesses. And while the Indonesian Constitutional Court has actively intervened in electoral disputes and human rights cases, often supporting the deepening of democratic practice, the bold interventions of Thailand’s Constitutional Court during the political crisis in 2006–08 tell a far more cautionary tale, one that has raised questions about the independence of the court and ultimately undermined its legitimacy.<sup>68</sup> In other countries, meanwhile, the behaviour of the courts has been far more muted, to the point that some have largely failed to consistently uphold the rule of law. This is certainly true of the socialist countries in the region, but also of Cambodia, Malaysia and Singapore, states where executive and single-party dominance have in practice considerably constrained judicial behaviour, particularly in terms of political cases.<sup>69</sup> That has led to claims that justice mechanisms are absent.<sup>70</sup>

In the wider political context, judicial attempts at greater assertiveness have occasionally been forcefully rebuffed by the executive, as was most obvious in the Malaysian constitutional crisis of 1988, which ended with the ouster of the Chief Justice and two of his colleagues. That event still has repercussions today, especially in high-profile political and religious cases that raise troubling questions about the independence of the Malaysian court system.<sup>71</sup> The 2012 impeachment of the Chief Justice of the Philippines for failing to report assets has been tainted by suggestions that the executive was trying to gain control over the court, which had been seen as hostile to him due to the close connections of the justices to his predecessor.<sup>72</sup>

Similar, though perhaps more subtle, interference is reported from Cambodia, and even in Singapore close relations with political elites have led to active judicial support for the state’s communitarian values (political stability, interracial harmony and economic development), which in turn severely limits the role of the courts in constitutional and political matters. And while so far the Indonesian Constitutional Court has won much praise for its assertive and balanced views, the 2013 impeachment of its Chief Justice for corruption is a vivid reminder that perennial problems of capacity and corruption endemic to the region challenge public trust in judges and courts.<sup>73</sup> This is particularly so when courts are tested in high-profile political cases.

Newly empowered and critical to safeguarding the constitutional order, courts have become central actors in the region’s search for

viable justice mechanisms. Yet, with a growing role in political matters, they have found it hard to avoid political interference and public criticism, particularly when megapolitical cases can divide a whole nation. How courts navigate the demands on them and whether they can resolve high-profile constitutional conflicts in a manner seen to be fair and consistent with rule of law principles will be critical to the future of constitutionalism in Southeast Asia.

## **Conclusion**

In this article, we have sought to draw attention to four sites of continuing constitutional contestation — constitutional drafting and design; individual and religious rights; the role of military in constitutional politics; and the rule of law and courts — that are of critical importance to how constitutional practice evolves in Southeast Asia. In doing so, we seek to replace traditional legal scholarship with a distinctly political lens through which to view constitutional debates and the divergence between constitutional documents and actual practice in the region.

As the articles selected for this special edition highlight, Southeast Asia is indeed a challenging environment for constitutional theory and practice. Notwithstanding more than two decades of far-reaching constitutional and institutional changes, most states in the region are at best hybrids of tradition and Western constitutional practice, and features central to constitutionalism (separation of powers, checks and balances, judicial review and the rule of law) can be observed only partially at best. The diversity of political regimes in the region, from authoritarian through ideological counter-narratives (e.g. socialist, communitarian), and the traditional weakness of justice institutions that resulted from colonial practices and executive dominance are a partial explanation but are hardly sufficient to account for the current dynamics. A much better understanding might be gained by concentrating on the struggles, bargains and contentious politics that take place among elites and between them and other citizens in the four constitutional areas treated here.

It is hoped that our approach will help pave the way for a more nuanced understanding of Asian constitutional developments, one that does not view current outcomes as simply lagging versions of Western Constitutionalism but rather as distinctive models that directly reflect the unique socio-political struggles — and bargains — among social forces in the region. It should be clear from our

description that constitutional trajectories are likely to remain diverse and far from certain, especially since the region lacks the cultural and political homogeneity of East Asia.<sup>74</sup>

By substituting for current legal and socio-legal approaches a distinctly political view of the contentious dynamics that underpin constitutional settlements in Southeast Asia, it is our hope to offer a new perspective on how the constitutional transformation is evolving in the region. It is also our hope that this entire special edition will stimulate a new research agenda, one that is both theoretical and empirical, on constitutional politics in the region.

### NOTES

- <sup>1</sup> Kevin Y.L. Tan, “The Making and Remaking of Constitutions in Southeast Asia: An Overview”, *Singapore Journal of International & Comparative Law* 6, issue 1 (2002): 1–41; Jörg Menzel, “Constitutionalism in Southeast Asia: Some Comparative Perspectives”, in *Constitutionalism in Southeast Asia*, vol. 3, edited by Claus Peter Hill and Jörg Menzel (Singapore: Konrad Adenauer Stiftung, 2006), pp. 9–32.
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- <sup>8</sup> Tan, “The Making and Remaking of Constitutions in Southeast Asia”, op. cit..
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- <sup>12</sup> Victor V. Ramraj and Arun K. Thiruvengadam, eds., *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge: Cambridge University Press, 2009).
- <sup>13</sup> Randall Peerenboom, eds., *Asian Discourses of Rule of Law* (London and New York: RoutledgeCurzon, 2004).
- <sup>14</sup> For a good overview see Torsten Persson and Guido Tabellini, *The Economic Effects of Constitutions* (Cambridge and London: MIT Press, 2003), pp. 1–20.
- <sup>15</sup> Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes* (Cambridge and New York: Cambridge University Press, 2014); see also Tom Ginsburg and Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge and New York: Cambridge University Press, 2008).
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- <sup>24</sup> Ramraj, “Constitutional Tipping Points”, op. cit.; Björn Dressel, “The Judicialization of Politics in Asia: Towards a Framework of Analysis”, in Dressel, *The Judicialization of Politics in Asia*, op. cit., pp. 1–14.
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- <sup>30</sup> Loewenstein, *Political Power and the Government Process*, op. cit., p. 148.
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