

# JOURNAL OF DEMOCRACY

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# STRENGTHENING CONSTITUTIONALISM IN ASIA

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Is liberal democracy in retreat? Around the world, scholars and advocates of democracy have been worrying that it is. Recently in these pages, Roberto Stefan Foa and Yascha Mounk lamented the loosening hold of liberal-democratic attitudes on citizens even in the West's leading developed democracies, and warned about the dangers of democratic deconsolidation in those countries. The worry has been particularly acute in Asia, where the notion of *illiberal* democracy (often offered as part of the “Asian values” argument) has long been advanced as an alternative to the checks and balances of liberal constitutionalism. This version of democracy typically means fewer institutional constraints on populist or authoritarian-minded leaders, curtailed rights and liberties, and weaker public accountability and media oversight.

With many of Asia's emerging democracies now in some state of constitutional stress, there is a growing appreciation that simply calling for free popular elections is not enough. Democracy requires the sort of political inclusion and public accountability that only liberal institutions can secure. Without the fully functioning constitutional fundamentals embodied in elections, human-rights protections, a free press, institutional oversight, and the rule of law, popular government will never be stable, and poorer and excluded sectors of society will look outside democracy for solutions to pressing public problems.

As we think about the challenges facing constitutionalism in Asia, we must distinguish between the liberal world economic order, now much under attack by those left behind, and liberal democracy at the domestic level. There is a danger that, as efforts go forward to address the failings

of the former, the latter will be swept away.<sup>1</sup> This is not to say the two are unconnected. Jack Snyder has recently outlined that connection very well in this journal, and some years ago I argued in print that liberal constitutionalism is better than authoritarianism at delivering a stable and reliable order conducive to economic development.<sup>2</sup> But what about those Asian democracies that have already made a choice for liberal constitutionalism, but may be coming up short in designing or applying it, or be facing a wave of populism? They are the focus here.

The failure to achieve constitutional fundamentals in governance can be due to problems on one or both of two levels: 1) shortcomings in constitutional design; and 2) shortcomings in constitutional commitment. In Asia, design problems often exist where authoritarian regimes offer reforms that they tout as democratic but that rob checking and balancing institutions of their autonomy and power. Failures in liberal commitment, by contrast, seem to flow not so much from regime machinations as from Asian citizenries that are unaware of and unengaged with core liberal institutions.

When it comes to “building in” liberal values and practices as lived realities of how democracy functions in a given society, popular civic engagement is key. Democratic success has long depended on liberal institutions to check and channel the popular will, to enable free debate, and to safeguard minority rights. But liberal institutions require widespread understanding and support: People must believe in them, and back them up at the sticking point. If such belief weakens or never takes hold, the way is open for popular backing of rogue leaders who willingly, even gleefully, flout core liberal commitments. Democratic retreat or even breakdown may be the sad result.

As Asian countries have emerged from authoritarianism in the aftermath of popular protests or even prolonged civil war—as in Nepal and Sri Lanka in recent years—constitutional crises have often ensued. Emerging democracies with weak institutional commitments, such as the Philippines and Thailand, have backslid toward authoritarian rule. At the same time, aspiring democracies that claim to be moving away from authoritarianism (such as Bangladesh, Burma, Hong Kong, Indonesia, Malaysia, the Maldives, Mongolia, and Timor-Leste) remain fragile and under constitutional stress. Even the established democracies in South Korea and Taiwan must cope with corruption as well as constitutional and human-rights challenges inherited from their respective authoritarian pasts. In many cases, failure to maintain a strong popular commitment to liberal constitutional fundamentals means risking the collapse of democracy, the return of authoritarianism, and even the outbreak of violent conflict.

In Asia today, nearly every major political crisis or human-rights problem has constitutional roots. Where illiberal populist movements challenge constitutional guarantees, the politics of expediency and po-

larization all too easily prevail. The independence of the courts and other constitutional bodies—and with it their ability to fight corruption or protect human rights—may be undermined. Without independent insti-

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tutions to guard them, basic rights of speech and association may be lost or diminished, disarming the poor in their fight against economic inequality and poverty. Structural deficits regarding the separation of powers and the autonomy of oversight institutions sap protections for minorities and women. Federal arrangements designed to protect minority or indigenous regions may be ignored.

Populism sometimes draws the

support of people suffering from the economic and social ills of flawed systems, but it cannot escape the reality that any effort to overturn an unjust order without addressing its underlying problems will only give rise to another unjust order.

Authoritarian governments in Asia have long presented those committed to democracy, good governance, and human rights with a tough problem. These governments have often been able to boast of early economic successes that have made them models for later-developing countries. Authoritarians and their apologists have disparaged rights safeguards as “Western imports,” at best unsuited to Asian societies, and at worst downright destructive of their safety and stability. Soft authoritarianism teamed with export-led growth, these regimes and their defenders have claimed, is superior to the more chaotic and confrontational practices of modern Western democracies.

Such “Asian values” arguments, having been heard for decades in the region, had seemed to suffer a decisive blow in the face of massive democracy protests in the 1980s and 1990s, followed by the severe Asian financial crisis of the late 1990s. Popular demands for democratic reform, good governance, and human rights offered an indictment of authoritarianism. Governments that liked to clamp down on freedom could no longer provide the stability and order that they had been claiming they alone could supply to the complex, rapidly developing societies they ruled. Authoritarians who relied on “performance legitimacy,” in short, had been decisively undercut by events.

Or had they? Since their setback almost two decades ago, illiberal approaches have gained a new grip. Authoritarian rulers have offered concessions to demands for democratic reform that nonetheless seek to baffle and resist key aspects of constitutional liberalism. Elected leaders in South and Southeast Asia have increasingly favored populist strate-

gies to court the ethnic and religious groups that form their respective bases, while excluding minorities. Extremism has become a common by-product of such ethnic tensions. The cycle of exclusion and extremism has made it hard for friends of liberal constitutionalism and human rights—which heed no distinctions of color, creed, class, or caste—to gain a hearing for liberal values and institutions.

### Seven Imperatives of Liberal Constitutionalism

What to do in face of all this? The best way to begin answering that question, I submit, is to take stock of essentials. Whether a society is designing a new basic law or trying to move through later phases of democratization, there are seven principled imperatives which, if fulfilled, will give liberal-democratic constitutionalism its best chance to take hold and succeed. They are as follows:

**1) *Spread the understanding of broad constitutional goals early and widely.*** This first principle recognizes that simply mobilizing civil society will not be enough. The content and reach of that mobilization matter if the movement is to achieve its liberal-democratic objectives and not be hijacked or worse. All too often, participants in popular protests agree on what they are against but not on what they are for.<sup>3</sup> This can lead to political chaos if serious changes (including regime collapse) are set in motion, and may explain many of the constitutional crises that have plagued Asia. If the mere replacement of one authoritarian regime with another is to be avoided, activists need to treat a democracy movement as an educational as well as a political enterprise.

Perhaps the best example of how to build an early consensus around core constitutional values and how to spread comprehension of them even under harsh economic conditions was what the Indian National Congress achieved starting in the late 1920s. With two decades to prepare prior to British withdrawal, the founders of independent India defied dire developmental conditions to put constitutional fundamentals in place and then address a plethora of concerns. The democracy that emerged has never been perfect, but it enjoys wide public support.

The capacity to deal with the many challenges arising from India's extreme diversity has been among the proudest achievements of Indian democracy. Indians have joked that democracy is like cricket, an Indian sport that just happened to be invented elsewhere. Scholars have highlighted how democracy has mediated difficult religious divisions both within Hinduism and between Hinduism and other religions. Beyond the fundamentals, constitutional decisions to give space to Hindu and Muslim "personal-status" laws and to opt for a flexible form of federalism have facilitated this mediation. Yet India cannot afford to rest on its laurels. Liberal constitutionalism is always a work in progress in need of renewal. Liberal secular values have recently been greatly challenged

as Hindu nationalism has taken hold.<sup>4</sup> As India's system of equal rights guarantees and personal laws faces continuing challenges from phenomena as diverse as Hindu "beef bans" and Muslim divorce laws, liberal reflection and renewal will remain urgent tasks.

Contrast India's constitutional founding with the "people power" movement that brought down Philippine dictator Ferdinand Marcos in 1986. That inspiring campaign won stunning success, but in hindsight it seems like a textbook case of people agreeing on something to oppose (the Marcos regime) without concurring about much else. Long influenced by U.S. constitutionalism, Philippine elites put together a liberal-democratic constitution, but without a widespread popular grasp of and commitment to liberal-democratic institutions.<sup>5</sup> Philippine leaders since have had too free a hand to push aside constitutional basics, as has been evident in military impunity as well as high levels of crime and corruption. A turn to populism has now ensued with the 2016 election of President Rodrigo Duterte, a leader who openly boasts of his lawbreaking and contempt for constitutional requirements.

While popular democracy protests have also been a feature in Burma and Thailand, neither country has found its way to full liberal constitutionalism. In Burma, the long-ruling military regime wrote a new constitution in 2008 that was more democratic, but which also held provisions meant to let the soldiers keep their grip on power and avoid accountability. The military, for instance, enjoys guaranteed control over a quarter of the seats in parliament; no constitutional amendment can pass without military assent. The armed forces also decide who runs the key ministries of defense, home affairs, and border affairs. When it is time to choose the president, the soldiers are empowered to select one of the three candidates to be presented to parliament. Finally, the military holds a guaranteed majority on the National Defense and Security Council (NDSC), giving the top general sway over any civilian chief executive.<sup>6</sup>

Thailand provides an example of how even a liberal constitutional design can fail if commitment is lacking. Touted as the "people's constitution," the country's 1997 basic law ranked as one of Southeast Asia's most liberal. Yet Thaksin Shinawatra, a populist leader with ample rural support, was able to dismantle it from within after he won election to the premiership in 2001. The urban-rural split proved stronger than core liberal-constitutional values. By 2005, Thailand had begun sliding toward an era of crises and coups. The most recent putsch, which took place in 2014, ushered in the current military regime. Indonesia, the Maldives, Mongolia, Nepal, Sri Lanka, and Timor-Leste have all struggled to consolidate democracy through political ups and downs with varying degrees of success and failure. In every case, early understanding of and popular support for liberal-constitutional basics can be a great asset in meeting the challenges ahead.

**2) Activists and constitution-drafters must emphasize core constitutional fundamentals.** The basics here include democracy, human rights, and the rule of law, as well as associated oversight institutions to provide what is sometimes called “horizontal accountability.”<sup>7</sup> Democracy embodies popular sovereignty—giving expression to the principle that government must be by consent of the governed—and is grounded in a basic social contract that both empowers and constrains. Human rights, rooted in the historic notion of natural rights, may also be understood in many societies to include a range of social and economic rights. Constitutionalism needs to have a lively, dynamic quality—to be a living thing—with core institutions interacting to uphold the values that undergird the system. The rule of law, reflected in constitutional judicial review and other forms of oversight, makes democracy and human rights possible by providing an engine to drive constitutional politics, where legislatures speak and courts and other institutions of horizontal accountability respond.

To these three core elements may be added the notion of what I call “indigenization.” This is not the same as the “Asian values” argument or other forms of cultural relativism. The notion of indigenization begins with the premise that liberal-democratic constitutional fundamentals must and will be maintained, and that appeals to “local values” cannot justify the denial or curtailment of these fundamentals. At the same time, indigenization appreciates that it is worth seeking locally resonant ways and means of recommending constitutional values and institutions to the particular society in question. Indigenization is premised on Aung San Suu Kyi’s claim about democracy’s wide appeal, while remaining mindful of her warning that democracy’s opposite has proven able to exert an appeal of its own:

The values that democracy and human rights seek to promote can be found in many cultures. Human beings the world over need freedom and security that they may be able to realize their full potential. The longing for a form of governance that provides security without destroying freedom goes back a long way. Support for the desirability of strong government and dictatorship can also be found in all cultures, both Eastern and Western: the desire to dominate and the tendency to adulate the powerful are also common human traits arising out of a desire for security.<sup>8</sup>

**3) Constitutionalists must refute appeals to Asian exceptionalism and expose their roots in the authoritarian past.** As noted above, both long-ruling authoritarians and emerging populists in Asia have been known to push back against pressure for constitutional reform by arguing that what reformers want is unsuitable and even destabilizing for Asian societies. The challenge for democracy activists and constitutional reformers is to show how liberal constitutionalism can effectively address cultural and religious concerns while encouraging sustained economic development.

Constitutional success is measured not by a lack of challenges, but by the ability to cope with them when they arise. India, South Korea, and Taiwan have defied colonial or authoritarian naysayers and built popular consensus into their constitutional fabric. India's democracy has been justly famed for its ability to incorporate nonviolent protest strategies along with secular constitutional values and practices, in the face of ever-present Hindu nationalism and regional ethnic conflicts. The rising challenge to Indian secularism that this poses is noted above. A key ingredient of India's success so far has been the ability to protect minority rights in this exceedingly diverse country. Indigenization, in the form of a federalism sensitive to regional concerns and a legal system that gives a degree of space to certain Hindu and Muslim personal laws (covering divorce, inheritance, and the like), has played a crucial role.

South Korean and Taiwanese democracy arose out of the same Confucian legacy that has been used as a source for the "Asian values" discourse. In South Korea, the *minjung* (masses) movement that toppled the authoritarian regime in 1987 took care to instill wide support for liberal fundamentals—no small feat in a country that had seen five failed republics since 1948. The recent impeachment of President Park Geun Hye in accord with the rule of law has demonstrated both the success of Korean democracy and a challenge (corruption) that it faces.

Taiwan shares with South Korea divided-state status and the Confucian tradition. Here again, popular protests pushed the former authoritarian regime to accept liberal constitutional reform. Two institutions already established under the authoritarian regime, the constitutional court (long dormant under martial law) and the presidency, helped to push these demands forward. Since the lifting of martial law in the 1980s, the court has proven a major guardian of Taiwan's democracy. Both countries have benefited from strong civil societies willing to defend liberal-democratic institutions—even taking to the streets in massive protests when necessary.

**4) *Democracy-builders should emphasize support for inclusive constitution-making.*** The task of writing and passing a new constitution typically comes on the heels of a broad-based revolution or reform movement. The challenge is to maintain diverse support going forward in order to prevent constitutional breakdown and democratic retreat. Framers typically face "upstream" constraints imposed by the previous regime or by a conflict-settlement agreement, and the "downstream" limits of the ratification or referendum process. As Jon Elster has argued, bargaining at this intense stage often goes beyond narrow interests to include ideas, passions, legitimacy, principles, and norms.<sup>9</sup> Such bargaining can be encouraged through proper consultative processes in the constitution-making phase. Consultations should include the reception of general public opinion and responses to competing constitutional proposals from the public at large, as well as from community groups, political parties, NGOs, and

advisory committees of experts. Local expert advisors with some foreign support are often crucial in explaining liberal constitutional fundamentals. Bargaining, and the coalition politics that goes with it, fosters popular understanding and support for constitutional fundamentals. There will be openings for productive indigenization, as domestic groups with distinct value-based concerns weigh in. If all goes well and constitutional fundamentals are maintained, local “buy-in” to the new modes and orders can increase.

If founders can reach a strong consensus on core goals, their ability to lock in an appropriate constitutional design before self-interests overwhelm the process will be greatly enhanced. If this does not happen, as for example in Nepal under Maoist influence, a final constitutional settlement can be delayed for years. A good path may be to focus on fundamentals at the founding and to consider indigenous concerns in future amendments. India has done this, enacting more than a hundred amendments since adopting its constitution in 1950. This implies ease of amendment as a constitutional feature—a risk, but in India’s case, one that has proven wise.

A more serious problem respecting inclusion arises when an elite such as the military imposes its will on the majority. In Burma, the generals used a sham constitutional conference to effectively decree the 2008 basic law.<sup>10</sup> The opposition was told to take it or leave it. Under the leadership of Aung San Suu Kyi, the National League for Democracy (NLD) initially rejected this flawed constitution, boycotting the 2010 elections and using what leverage they had to bargain, unsuccessfully, for the removal of objectionable provisions, such as one barring her from the presidency. But eventually the NLD opted to take up the offer, presumably in the hope that it would be able to gain power and repair the damage. The NLD did indeed win the 2015 parliamentary election, taking 390 of 491 seats, but the constitutionally guaranteed seat share the military gave itself still blocks any amendment. The weak NLD government faces severe ethnic and regional disputes while having little power to deal with them.

It has been said that, when it comes to development, parliamentarism beats presidentialism because the former is more conducive to coalition-building. But in an illiberal context, a premier no less than a president may prove adept in the dubious arts of electoral authoritarianism, power-grabbing, and subverting or defying both legislative and administrative oversight. A strong legislative majority behind a populist president or premier can undermine constitutional safeguards. In the Philippines, Duterte won the presidency with only a popular-vote plurality. But legislators shifted the support to him—Philippine chief executives have controlled a slush fund and enough pork-barrel projects to coopt a lot of opposition—and his abuses go unchecked.

Thailand’s 1997 “people’s constitution” included a popularly elected nonpartisan Senate (nonparty candidates only, with no open campaigning allowed) empowered to appoint independent oversight bodies such

as the Constitutional Court, Election Commission, National Human Rights Commission, and National Counter Corruption Commission. Yet Thaksin captured the Senate and bent these institutions to his will.<sup>11</sup>

Under military rule, Thailand has since followed the Burmese model of a “take it or leave it” basic law handed down by generals. The only added touch was a referendum where opposition campaigning was effectively forbidden. This document, promulgated in April 2017, privileges the military. The Senate retains its appointment powers over constitutional-oversight bodies, but the Senate itself is now appointed. Those bodies are therefore expected to be beholden and submissive to the military. The support that Thailand’s urban middle classes give to the military’s illiberal agenda is just the flipside of the support that poor rural areas gave to Thaksin’s illiberal populism: One dominant group has displaced another.

In constitution-making, it is vital that the dominant group or leading party show restraint, as happened in India, South Korea, and Taiwan. Populists in the Philippines and Thailand have not been notable for such restraint. Neither have dominant parties in Bangladesh, Malaysia, and Nepal. For civil society activists or anyone committed to liberal constitutionalism, the importance of wide inclusion will be evident.

Focusing on constitution-making in nineteen postconflict societies, Jamal Benomar emphasizes “the absolute necessity of a thorough, unrushed, and consultative constitution-making process.” He notes, “This is no time for reckless optimism about the likely pace and prospects of reform; time will be needed to allow for wide-ranging consultation and consensus-building on challenging constitutional issues.” He emphasizes the importance of “giving all actors a sustained opportunity to commit themselves to the constitution-making process.”<sup>12</sup>

In diverse Asian societies this is wise advice whether the situation is postconflict or not. I would add the importance of building in institutions and rights that can sustain this high degree of inclusion as the new constitution is implemented. Political parties and other community organizations can be instrumental in engaging diverse groups and educating the public on the functioning of liberal institutions. Excluding minority groups and the poor from power will not lead to a durable democracy.

**5) *Emphasize the building of autonomous institutions to secure constitutional fundamentals, including basic human rights.*** Failure at this task has long been the curse of Asian constitutionalism. As liberal oversight and human rights retreat, old authoritarian ways return. Emerging Asian democracies, emphasizing expediency, have long struggled to secure the independence not only of courts but of bodies that oversee elections, protect rights, and fight corruption. Design flaws may permit governments to stack courts and commissions with cronies, as in Thailand. Or populists may attack these institutions, as they have done by means of judicial impeachments in Nepal, the Philippines, and Sri Lanka.

Anger at human-rights abuses often drives democracy movements, so setting up autonomous constitutional-oversight bodies should be a central concern during a democratic founding. Nearly every Asian democracy has national human-rights and anticorruption commissions—there are more than a dozen of the former across the region. Yet these institutions are often not as autonomous as they should be. Guaranteeing institutional autonomy in the face of entrenched power is one of the hardest challenges facing a new democracy.

At a minimum, appointments to these bodies should involve recommendations from subject-matter experts as well as wide civil society consultations, especially in the grassroots communities that such institutions aim to protect. If the judiciary is itself independent and widely trusted, it may play a key role. Giving commissioners fixed tenure with no reappointment may also discourage political interference. Such selection processes require not only a strong civil society, but also a free press to champion transparency and public accountability. This can be especially important where abuses by the military have been a major problem, as in Burma, Indonesia, Pakistan, the Philippines, and Thailand.

The case of Thailand after the 2014 coup shows how a military-drafted constitution can threaten both human rights and institutional autonomy. A Thai constitutional-law scholar notes that the National Human Rights Commission is being turned into a tool for defending the country's human-rights record. He worries about the new constitution: It allows rights restrictions so long as they comply with a vague notion of the rule of law; it says that speech can be controlled if it might lead to hatred or division in society; it decrees that academic freedom must not breach civic duties or public morals; and it privileges Buddhism over other religions. And the application of all these open-ended qualifications attached to rights is to be judged by agencies thoroughly beholden to the regime.<sup>13</sup>

A network of Thai legal experts known as Khana Nitirat (Law for the People) worries that Articles 265 and 269 of the 2017 Constitution hand the Constitutional Court and the unelected Senate extraordinary powers with which they can override democratic institutions and the civilian government. The first parliamentary elections will not occur until late 2018 at the earliest. In the meantime, Khana Nitirat fears, the military will extend its influence deep into the new constitutional order. Across Asia, many human-rights and anticorruption bodies face similar challenges.

Religion adds a distinct twist to the human-rights picture in Asia. Religious laws may challenge secular human-rights norms and pose a particularly difficult challenge to human-rights institutions. Can religious sensitivities be satisfied while liberal human-rights institutions and commitments are sustained? Some religious societies have struggled with the secular liberal value of tolerance. Discussing societies where Islam is the dominant religion, Dawood Ahmed and Tom Ginsburg have argued that constitutional clauses declaring the supremacy

of Islamic law (sometimes adding that no law “repugnant to Islam” can be valid) may not be as hostile to secular human-rights guarantees as is commonly felt.<sup>14</sup> These clauses are often accompanied by stronger rights guarantees thanks to coalition politics and bargaining during the constitution-drafting process. Autonomous secular institutions may be instrumental in this regard, as has been the use of independent courts in India to enforce personal religious laws.

**6) *Constitutional judicial review must be regarded as a foundational institution that is crucial to constitutional integrity and human-rights protections.*** Nearly every democracy in Asia has adopted constitutional judicial review to secure constitutional compliance, though the track record regarding judicial independence is mixed. The absence of this core institution has generally been the mark of an authoritarian regime. While scholars of democratization have long known the importance of constitutional judicial review, they have paid less heed to the contribution that it can make to overall democratic discourse. Without constitutional oversight from independent courts, an emerging democracy may come under the sway of what Guillermo O’Donnell called a “caesaristic plebiscitarian executive that once elected sees itself as empowered to govern the country as it deems fit.”<sup>15</sup> Alexander Bickel appreciated long ago that, while justices of constitutional courts are typically unelected, they contribute enormously to constitutional dialogue between the judiciary and the elected branches of government.<sup>16</sup> The keys are the integrity of judicial appointments and tenure, and the prudence of judicial decisions going forward.

An appointment process that secures judicial independence in the constitutional-review process is vital. The most successful Asian examples have included appointment of judges on the recommendation of a judicial-selection commission (Hong Kong); selection by a collegium drawn from the ranks of serving jurists (India); presidential nomination with legislative approval (Taiwan); and selection by some mixture of the three branches of government (South Korea). Emerging democracies without many experienced jurists may even invite foreign judges to sit alongside locals temporarily, as is currently done in Hong Kong. Other factors that weigh on independence and quality may include the term of appointment (typically fixed and nonrenewable) and the writing of concurring and dissenting opinions (a feature in Hong Kong and Taiwan). For constitutional-court judges to write separate concurrences and dissents is transparently an act of judicial independence, and can contribute to the depth and quality of constitutional jurisprudence.

To evaluate the performance of courts in fledgling democracies, Tom Ginsburg distinguishes “high” from “low” equilibrium conditions. In the low-equilibrium situation, courts are excessively activist (often in service of a political agenda), and there is substantial risk that their decisions will be ignored.<sup>17</sup> High-equilibrium constitutional courts are more circumspect, but therefore may risk avoiding matters where ju-

dicial intervention is warranted and could aid the democratic process. The current South Korean Constitutional Court (established in 1988) and Taiwan's Council of Grand Justices (reformed in 2003) both appear to have found the happy middle ground—neither too activist nor too restrained—that Ginsburg's analysis suggests is best.

Jiunn-Rong Yeh and Wen-Chen Chang emphasize that the South Korean and Taiwanese constitutional courts have earned respect by responding to popular political agendas, avoiding excessively countermajoritarian decisions, and not pushing their own independent agendas.<sup>18</sup> Their survey of cases further shows an emphasis on basic civil and political rights, with no apparent tendency to rule in favor of "Asian values." Case law has been particularly attentive to the character of the electoral process and the rights of civil society, including prohibition of discrimination. This record of prudent credibility has enabled the court in Taiwan to become more active in recent years, as is evident from its 2017 *Interpretation No. 748* upholding same-sex marriage. The constitutional courts of Korea and Taiwan, like the Supreme Court of India, have been the most trusted institutions of state in their respective countries.

In emerging Asian democracies, judicial review has been important to the survival of the constitutional system. Emerging democracies often face the risk that dominant groups will reject the constraint of unfavorable judicial rulings. One of the great blessings that attended the Republic of India's founding was the resolve of the Indian National Congress, which dominated the constitution-drafting process, to create independent courts rather than judicial bodies subservient to the ruling party's will. This decision against narrow party self-interest laid one of the major foundation stones of Indian democracy. Given the inherent risk that early idealism will fade, turning noble resolutions into concrete institutions as quickly as possible is a wise course indeed.

Not all democracies in Asia have fared as well as India's. The constitutional courts in Burma, the Philippines, and Thailand are all problematic in various ways.<sup>19</sup> Without sufficient training and experience, constitution-makers in an emerging democracy are unlikely to appreciate how grave it is to lack sound constitutional jurisprudence. This is an area where outside support can be helpful.

**7) *The role that federalism and subnational-autonomy regimes play in multinational states is vital and must be seen as such.*** Constitutionalists in emerging Asian democracies often face sectarian conflict, making it difficult to incorporate historically distinct regions into the constitutional fabric. Political exclusion and rights abuses targeting ethnic or sectarian minorities have been the source of most of the armed insurgencies across the region, with obviously negative implications for democracy.

Reflecting on the case of India, Alfred Stepan, Juan Linz, and Yogendra Yadav have offered their concept of the "state-nation" to capture the Indian method of respecting ethnic differences while fostering a sense of

national identity.<sup>20</sup> The distinction that they draw between robustly multinational states, states with non-territorially based diversity, and culturally homogenous states illuminates distinctive conditions and associated optimal strategies across Asia. These conditions and strategies can indicate whether a federal or an autonomy arrangement is most appropriate, and what shape it should take.

The genius of the Indian approach, as these scholars tell it, is to respect multiple and complementary identities precisely as a way of making inclusion in a larger multinational state less threatening to minorities. The nested set of policy and institutional choices that Stepan, Linz, and Yadav emphasize fits well with the idea of a liberal constitutional discourse that I am trying to advance here. They add a willingness to entertain the possibility that in some cases an asymmetric type of federalism might make sense, with some regions of the country living under different structural arrangements than others. A combination of federalism and autonomy arrangements is another possible approach.

When it comes to problems of national unity and minority relations, Burma offers both a cautionary tale and some grounds for guarded hope. Two-thirds of the population are ethnic Burmans. They predominate in the military, which has for decades been intermittently battling various ethnic minorities who control outlying parts of the country. The level of mutual trust, not surprisingly, is abysmal. To make things even more complicated, within the larger minority areas are “nested” smaller minority groups. Moreover, the military has encouraged the growth and militancy of a Buddhist-nationalist organization known as the MaBaTha.

The hopeful signs are that the MaBaTha did not secure victory for the military’s political party in the November 2015 parliamentary election, and that this party negotiated a nationwide ceasefire before leaving office. Although seven of the fifteen Ethnic Armed Organizations (EAOs) refused to sign the ceasefire, it has nonetheless created a positive context for further negotiations over federalism.

The election’s winner, Aung San Suu Kyi’s NLD, supports federalism and can boast an 80 percent mandate that includes wide support from ethnic-minority voters. The NLD was able to make Aung San Suu Kyi first counselor (the equivalent of prime minister) and form the government, though they remain hampered by the military veto and other restrictions that the junta built in at the constitutional level. The NLD has nonetheless been pushing as best it can to create a liberal and inclusive federal system. As the most recent available report (dating from June 2017) informs us, questions about the right of secession and whether the EAOs can retain their own armed formations remain unresolved.<sup>21</sup> Moreover, the NLD’s commitment to protecting human rights has been put in question by the party’s failure to deal effectively with the problems of the Rohingya people. A mostly Muslim group, they are not accepted as Burmese by many of their compatriots, despite having

lived in Burma for centuries. It is estimated that hundreds of thousands of Rohingya languish in resettlement camps.

If democracy is to safeguard human rights, the basic institutions of liberal constitutional governance must be better understood in society at large and fully developed in the ongoing constitutional process. The basic institutions of liberal constitutional governance must be shaped to address conditions on the ground, with an eye to giving civil society and public accountability bigger roles. Constitutionalists and supporting organizations across Asia need to better understand and popularize the dynamic processes that drive these institutions and bring constitutionalism to life. The ultimate objective should be to lay sound local constitutional foundations upon which stable development and human-rights protections can stand. Ceding the field to illiberal conceptions of democracy will not only open the door to human-rights abuses, but will leave democracy itself at risk of being discredited.

The seven key imperatives outlined above show where democracy-building efforts should focus in Asia. Resources, expertise, and experience from outside the region can be helpful. A “thin” approach to constitutionalism that concentrates on elections or on lists of formal rights will fail. So will any movement for democracy that dwells on opposition without giving much, if any, thought to developing a consensus about “what should come after” once an authoritarian order is toppled. The best approach to reform will stress how crucial institutions are to constitutionalism and human rights, and will seek agreement on key liberal institutions that can secure accountability, respect for the rule of law, and constraints on raw majoritarianism. Reformers and would-be reformers must ask themselves and one another early and often not just what they are against, but what they are *for*.

## NOTES

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