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**ASIAN CONSTITUTIONALISM AND LEGAL PLURALISM: PRELIMINARY
THOUGHTS ON GOING BEYOND THE «WORLD CONSTITUTIONAL
PHENOMENON»**

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Asian Constitutionalism and Legal Pluralism: Preliminary Thoughts on Going Beyond the «World Constitutional Phenomenon»*

Introduction. - 1. The world constitutional phenomenon. - 2. Legal pluralism as the typical paradigm of mainstream Asian constitutionalism. - 3. The cost.

Introduction.

1. The growth of the «**world constitutional phenomenon**» suggests that the scientific meaning of words and concepts be correspondingly adapted. The adapted meaning of «constitution and constitutionalism» requires a further qualification from the otherwise inevitable implicit connection with original Western liberal constitutionalism and its typical characters. In such context, reference to **Asian constitutions and constitutionalism** is consistent with the need for such further qualification when reasoning on the world scenario and requires the identification of some own distinguishing features, one of them most likely being, as suggested in the paper, **legal pluralism**.

2. The connection between the legal system (or legal tradition, such as civil law, common law, socialist law, religious law, chthonic – or indigenous or traditional or customary - law) and the constitution requires further scientific consideration, focusing **the primacy of the legal culture** (as it derives essentially from the legal system) **over the constitution**. While Western constitutionalism expressly intended to cancel possibly as many of any remaining areas of legal pluralism to the purpose of establishing a uniform citizenship, without any further specification that would qualify the legal status of individuals, **a clear intent of mainstream Asian constitutionalism is rather to protect its typical underlying legal pluralism**, deeply structured in its religious traditions and therefore taken for granted in the text of the constitution, **from Western constitutionalism**.

3. The cost – if it is indeed a cost within an Asian perspective, as it is most likely to be considered according to a Western or at least an European perspective – **of legal pluralism typical of Asian constitutions and constitutionalism** is twofold. **(i)** One first cost would be some inconsistency between the priority of preserving the domestic national constitutional identities qualified by their respective religiously-based legal pluralism, on the one hand, and the declared intent to establish a collective system for the promotion of human rights, on the other. **(ii)** The second cost would be the exclusion

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of Asian constitutionalism from **participating** and **contributing** to the development of a «**cosmopolitan constitutionalism**» which may be considered as representative of the current (best) evolution of the world constitutional phenomenon.

1. The world constitutional phenomenon.

1. The paper focuses on the «**world constitutional phenomenon**», namely the worldwide expansion of the practice of adopting a constitution; and assumes that, consequently, the meaning of the words and concepts (constitution and constitutionalism) cannot continue to refer to their original understanding, necessarily related to the early European and North-American experiences since the late 18th century.

The deliberate choice of the phrase ‘world constitutional phenomenon’ (instead of others, such as ‘world constitutionalism’ that may be misleading), in fact, means employing a **neutral, objective, value free acknowledgement** that most countries in the world have adopted a document which roughly describes the polity, lists the institutions that act on behalf of its government, spells out a number of expectations that citizens supposedly have on what those institutions of government are to do or not to do that will affect their freedom and welfare.

The a-critical implicit reference to Western liberal constitutionalism as the would-be world uniform constitutional paradigm does not prevent from the traps of a manifest oxymoron such as talking of ‘illiberal (or authoritarian) constitutions’. In fact, a good attitude for a scholar in front of the use of the words ‘constitution and constitutionalism’ would be one of diffidence, or at least of curiosity that would lead to double check, case by case, what is their proper meaning.

Within such adapted general and generic understanding, the ‘world constitutional phenomenon’ turns out to be expressive of the evident historical development of a cultural reality, namely the fact that words and concepts (such as constitution and constitutionalism) have gradually lost their original meaning and do not match with the typical features of early constitutionalism, as reflected (as far as continental constitutionalism is concerned) by art. XVI of the 1789 French *Déclaration des droits de l’homme et du citoyen* : “a society not having separation of powers and protection of rights does not have a constitution”.

Inevitably, therefore, the use of the words (constitution and constitutionalism) requires a specification and a qualification, that may be ideological, historical, geo-political or cultural, depending on the context and the purposes of the research. Hence the scientific interest for trying to specify and qualify the meaning of **Asian constitutions and constitutionalism**, as scholarship needs doing with reference to the application of the same words and concepts with regard to all other regions in the world.

Such an aseptic description of the phenomenon may accommodate the framing of constitutions that draw their inspiration from the original liberal ideology of Western constitutionalism as well as the world practice of adopting constitutions that are to be

related to different ideological inspirations that are coherently rooted in radically different founding principles, such as the unity of state power, the priority of one set of (proletarian) interests that deny the very legitimacy of other interests and therefore of their conflict (to be regulated by the law) as in the case of Marxism-Leninism also in its Asian epiphanies (China, Laos, Vietnam); or such as illiberal and authoritarian constitutions; or constitutions whose table of values and institutional arrangements are strictly reflective of a religious faith, once again rejecting the Western liberal secular rationalist and relativist worldview.

In other words, the world constitutional phenomenon has given evidence to the radical evolution of the very understanding of what a constitution is: from the typical original euro-atlantic liberal ideological notion of a sovereign act of a *normative* will limiting an absolute government through fundamental rights to the current non-typical concept of a sovereign act of a *political* will, compatible with all and any ideological foundations, directed to establishing a government, giving it the proper powers for managing life and development of its population.

Adopting the world as the proper setting for the comparative analysis of the constitutional phenomenon, therefore, highlights a twofold reality: the first, *space-wise*, is that the concept of a written constitution establishing a polity and its government has widely circulated around the globe; and the second, *time-wise*, is that a written constitution is a modern functional equivalent of the **normative and political ordering principle** through which polities and their government have always been established and managed.

In fact, it is such an ordering principle that inspires the framework of **substantive preconditions for the legitimacy of a written constitution**. The written constitution is indeed a rationalisation of the normative foundation of a social and political order.

That the word and concept of constitution and constitutionalism have gained a new **non-typical** (non euroatlantic-centric) **meaning** and that such new meaning is **non-ideological, non-universal, non-bound to philosophical origins and historical achievements, non-exclusive of any specific geo-cultural area** opens the way to a new generation of empirical and quantitative research, based on the mere existence of a constitution - as we have been witnessing in recent times -, without any further qualification and nevertheless makes traditional evaluative and qualitative methodology more complex.

2. Legal pluralism as the typical paradigm of mainstream Asian constitutionalism.

Any attempt at classifying and grouping constitutional documents and dynamics ought not to be merely geographical (constitutions in Asia or in Asian countries) but rather geo-political or cultural, searching specific features that may characterise Asian constitutions, taking into due account that Asia is a very rich and complex cultural reality, not easily amenable to shared standards.

Considering the strict relationship between law and society and the deep roots and pervasiveness of religions in Asia, inclusive of personal matters that may be

alternatively regulated by secular/state law or religious law, **the hypothesis of my research is that legal pluralism may be regarded as a distinct and prevailing feature of Asian constitutions**. Not necessarily the only one, but likely to be one the main ones, at least in a legal perspective that includes the constitution in the legal system of a given polity.

This paper suggests that **European** constitutions and constitutionalism are qualified by a **normative ordering principle** to be identified with **legal monism**, whereas **Asian** constitutions and constitutionalism show a widely shared attitude to reflect a basic setting of **legal pluralism**. An analytical macro-comparison between the two is indeed quite promising, also in view of the interest at considering the ways through which the Western legal tradition and Europe in particular have accommodated some exceptional areas of pre-existing legal pluralism and are now trying to cope with an emerging challenge of claims for the acknowledgment of new instances of legal pluralism (as a consequence of migration).

By legal pluralism I mean the coexistence of rules drawn from **distinct legal families within the same jurisdiction**, legal families being mostly derived by their respective and typical **method of law-making**: judicial method in the common law, political pluralist method in the civil law, political and mono-class in the socialist law, by supra-natural revelation and doctrinal and jurisprudential developments in religious law, by traditional customs in indigenous and chthonic law. The specification is necessary as a consequence of the recent trend of employing the same terminology (legal pluralism) to the distinct phenomenon of global or transnational law (or constitutional pluralism or multilevel constitutionalism) that is not related to the plurality of traditions (or families) of legal systems.

Reference to legal pluralism in the context of the paper is to be limited to the written constitutions and constitutional practices of South Asia and South-Eastern Asia.

A consequence and indeed a symptom of Asian mainstream legal pluralism is to be seen in the phenomenon of **personal laws** as well as the definition of the status of citizen with reference to a further qualification, often with regard to a religious affiliation.

Evidence of the structural existence of legal pluralism in Asian countries is offered by the Jurisglobe research project of the University of Ottawa¹. The Canadian research makes reference to **seven distinct arrangements for the coexistence of the various legal families within the same polity**; what emerges from this classification of Asian

¹ See <http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php> - the project has elaborated the following classification which is reproduced here just as an indication concerning Asia countries only: (i) Mixed systems of civil law and common law (Philippines); (ii) Mixed systems of civil law and customary law (China – but not Hong Kong and Macau -, Japan, North and South Korea, Mongolia and Taiwan); Mixed systems of common law and customary law (Bhutan, Hong Kong (China), Myanmar, Nepal, Papua New Guinea); Mixed systems of commons law and Muslim law (Bangladesh, Pakistan, Singapore); Mixed systems of civil law, Muslim law and customary law (Indonesia, Timor Leste); Mixed systems of common law, Muslim law and customary law (Brunei, India, Malaysia); Mixed systems of civil law, common law and customary law (Sri Lanka).

legal systems is that **not only there is legal pluralism but that such legal pluralism is plural itself.**

Asian legal pluralism has even expanded beyond the implicit recognition of religiously-based personal laws to the extent of accommodating as well the chthonic law practiced by indigenous communities, including their traditional methods of resolution of controversies. In this context, though, the text of constitutions tends to be explicit, as such recognition is innovative with regard to previous settings of the legal systems.

Whether religiously-based or connected to indigenous communities, the main problems faced by the Asian constitutionalisation of legal pluralism concerns the effectiveness of the supremacy of the constitution and its supposedly higher values – such as the principle of equality – over other rules of law derived from another typology of sources; and the models of interaction between distinct respective judicial institutions, going from a formalised radical mutual indifference (thus denying the effective supremacy of the constitution), to a practice of interference by state courts into the realm of religious autonomy, or to the attitude of deference by state courts in front of religious courts. Such problems may be sufficient to witness how legal pluralism contributes to qualifying Asian constitutionalism with its own cultural features. In fact, Asian constitutionalism shares such setting with African and Latin-American constitutions that have progressively expanded their recognition of indigenous law and jurisdiction.

3. The cost – if it is a cost within an Asian perspective as it would be in Europe – of legal pluralism typical of Asian constitutions is twofold.

(i) One first cost would be some inconsistency between the priority of preserving the domestic national constitutional identities qualified by their respective religiously-based legal pluralism and the declared intent to “**promoting human rights**” and “**to establish a framework for human rights cooperation in the region and contribute to the ASEAN community building process**”.

The quotation is from the ASEAN Human Rights Declaration, which further shows its main – somehow limited - inspiration in two provisions that clearly emphasise the national and the contextual dimension that provide the framework for human rights: namely, art. 6 (*“The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms”*) and art. 7 (*“All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds”*).

A collective human rights regional organisation requires some degree of interaction beyond a merely national and positivist understanding of human rights and their

protection. Furthermore, accommodating distinct religious and philosophical views of human rights (inclusive of Hinduism, Buddhism, Confucianism, Islam, Marxist-Leninist socialism, and others) within a unitary framework appears to be a fairly impossible task. The inconsistency results quite clear in view of the adoption of the 2012 Human Rights Declaration within the ASEAN framework, which is the only and most advanced experience so far achieved in Asia and yet so vague when compared with the European and Interamerican – and, although still at an initial stage, African - experiences of an international judicial system of protection of human rights based on a shared secular code.

The ASEAN Declaration, while being consistent with a strong connection between constitutions and religiously-based-and-differentiated legal systems, does not show an attitude favourably oriented towards the development of a shared (preferably judicial) machinery for the protection of human rights.

(ii) The second cost appears to be the exclusion of Asian constitutionalism from participating and contributing to the development of «**cosmopolitan constitutionalism**» which may be considered as representative of the current (best) evolution of the world constitutional phenomenon.

As Mattias Kumm describes it (in *Constituent power, cosmopolitan constitutionalism, and post-positivist law*, in *International Journal of Constitutional Law*, 2016), the new and growing general concept of “cosmopolitan constitutionalism” results from a “revised understanding of constitutionalism [that] is both cosmopolitan and post-positivist”, whereby “sovereign states and positive law retain an important role, but have to fulfil their role as part of a cosmopolitan and post-positivist conception of constitutionalism”. The same Author further suggests that, according to the interpretation of current constitutionalism offered by the vision of ‘cosmopolitan constitutionalism’, “constituent power is vested not only in the “We the People”, but also in “the international community””; and that “the constitutional legitimacy of national law depends in part on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends in part on states having an adequate constitutional structure. The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national/international divide”.

Other scholars – such as Vlad Perju and Alexander Somek - have also elaborated their understanding of cosmopolitan constitutionalism and it is quite clear that on the scenario provided by current scientific literature the chances of Asian constitutionalism being an active and convergent participant appear at the moment fairly shallow. And every time there is no dialogue, culture suffers.