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Panel Category	:	Law & Society
Panel Title	:	Narrative, Memory, and the Law
Participation Type	:	Panel Submission – Panel 4

Panel Abstract

The law is the definitive social form of modern societies. Law's ideal, the rule of law, lies at the center of modern understanding of a legitimate state. For law to play such a prominent role in modern societies entails that a legal system should achieve a certain degree of autonomy from other social systems. Its autonomy, however, does not mean independence, let alone imperviousness, from other social institutions. In so far as a legal system is regarded mainly as a system of norms (rules, principles, standards and etc.), we believe that it is not isolated from other forms of social discourse, such as narrative and memory. In contrast to some radical versions of legal positivism, we agree with Robert Cover's deep insights articulated in his classic essay "Nomos and Narrative", "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture." (Cover, 1983: 4) To understand the purposes and functions of law in fast-changing, pluralistic, even polarized contemporary liberal democracies, we need to understand the dynamics between law and other forms of social discourse and consciousness. How does contestation of social narratives and collective memory generate new social meaning that leads to change of law (jurisgenesis) ? How does law in turn frame the contestation of social narratives and memory? How does a new constitutional identity emerge or fail to emerge from such a process of contestation? At this panel, we explore the dynamics between law, social narratives and collective memory, and how the dynamics contributes to the formation of collective identities. We focus on Asian Pacific jurisdictions, including the role of national narratives in constitutional interpretation in the Philippines and Japan, the dynamic of a changing constitutional identity in Australia, and transitional justice/memory politics in Taiwan. Together, we hope to use experiences in these jurisdictions to shed light on the complex interactions between law, narratives, memory and identity. We will also offer our observations of how to evaluate law and politics, as well as the role of the court, in dealing with these dynamic issues.

Name of Author	:	Jimmy Chia-Shin Hsu (Convenor)
Designation / Academic Post	:	Research Professor
Institution / Organisation	:	Institutum Iurisprudentiae, Academia Sinica
Title of Paper (Convenor)		
Between Post-Transitional Justice and the Politics of Memory: The Case of Taiwan		
Abstract (Convenor)		
<p>We do not typically understand criminal justice to be about the construction or recovery of “memory”. It is about finding “facts”, i.e. facts of criminal offenses, and about assessing proper legal responses to such facts. Facts are solid and discoverable, whereas memory are malleable and fluid. However, when the idea of justice is placed in the periods of political transition, namely “transitional justice”, the boundary between fact and memory is blurred, especially as the concept of transitional justice has been consistently expanded to include not just during and immediately after political transition, but historical injustice committed generations ago such as slavery or oppression of indigenous people. Legal responses to facts and memory require different evaluative frameworks. However, since the dawn of the 21st century, there has been a trend to treat the two under similar frameworks, as characterized by the so-called “holistic approach to transitional justice” as shown in the 2004 UN Secretary-General “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General”. This paper uses the example of Taiwan to show that the holistic approach does not resolve the tension between “facts vs. memory”, and “justice vs. reconciliation”. I call the recent wave of measures dealing with the authoritarian past in Taiwan “post-transitional justice”, because it occurred when Taiwan had already transitioned to full-fledged liberal democracy. I argue that “post-transitional justice” in Taiwan involves not just the recovery of facts but the construction of memory structured in multiple layers of social narratives that are highly contestable. The contestability of how to frame the facts, in which historical narratives continue to fuel political polarization, makes “transitional justice” combustible political issues not easily resolvable under legal frameworks. The example of Taiwan calls for a reconsideration of the tendency of legalism (Judith Shklar, 1964) in the contemporary theory of transitional justice. It also calls for more attention to the untamable political nature of the politics of memory.</p>		
Brief Biography of Author (Convenor)		
<p>Jimmy Chia-Shin Hsu is Research Professor of Law, Academia Sinica, Taiwan. He received his LL.B. from National Taiwan University, LL.M. and J.S.D. from the University of Chicago Law School. He was the ASLI fellow of the National University of Singapore Law Faculty in 2016, Harvard Yenching Scholar 2016-2017, and co-convenor of the Free Speech Research Group of the International Association for Constitutional Law 2018-2022. His research includes legal philosophy, comparative constitutional law, civil disobedience, and transitional justice. Currently, he serves as President of the Taiwan Association for Philosophy of Law, which is the IVR (International Association for Social Philosophy and Philosophy of Law) Taiwan Section. His edited volume “Human Dignity in Asia: Dialogue between Law and Culture” was published by Cambridge University Press in September 2022. This year he will publish an edited volume (in Chinese) titled “The Ethics of Historical Memory”, which deals with the challenges of transitional justice and historical memory formation in Taiwan.</p>		

Name of Author	:	Ms Ashleigh Barnes (Panellist #2)
Designation / Academic Post	:	Ph.D candidate
Institution / Organisation	:	Macquarie University
Title of Paper (Panellist #2)		
The Role of Narrative, Memory and Evidence in Interpreting Constitutional Amendments		
Abstract (Panellist #2)		
<p>This article investigates the connection between formal constitutional amendment procedures – specifically, referenda – and changes in constitutional identity. I focus on two distinct attempts to ‘amend’ constitutional identity in Australia: (i) the ‘successful’ 1967 race-power amendments in Australia; and (ii) the failed 2023 referendum proposing recognition of the First Peoples of Australia by establishing an advisory body called the Aboriginal and Torres Strait Islander Voice to Parliament. This piece considers how courts can or should interpret constitutional amendments procedures: what role do narrative, memory and evidence as to contemporary understandings play?</p> <p>Part 1 considers the legitimacy of judicial reliance on popular understandings in interpreting constitutional amendments following referenda. Reliance on evolving social and historical realities varies in different constitutional systems and according to different interpretive approaches. Reliance on the values that are understood to underpin new social developments are even more controversial and face an additional set of legitimacy questions for courts. I investigate these arguments in the context of the 1967 race-power amendments and their subsequent interpretation by the High Court. I revisit a 1998 decision, in which several High Court justices suggested that insufficient evidence concerning popular understanding of the 1967 amendments was a reason to reject a transformed reading of the Commonwealth’s “race power” in Australia.</p> <p>Part 2 considers the role of failed referenda. It remains to be seen how the Court may interpret the failed 2023 referendum, if at all. Of course, a failed referendum does not change the textual basis of the Constitution, and thus does not necessitate novel constitutional interpretation. However, this article considers whether the failed referendum may nevertheless play a legitimate role in interpreting the unchanged Constitution.</p>		
Brief Biography of Author (Panellist #2)		
<p>Ashleigh is a final year doctoral candidate at the University of Oxford and a Lecturer at Macquarie Law School (Sydney, Australia). She researches the use of constitutional values in constitutional interpretation in general, and specifically, the meaning and operation of dignity as a constitutional value.</p>		

Name of Author	:	Yi-Li Lee (Panellist #3)
Designation / Academic Post	:	Assistant Professor
Institution / Organisation	:	National Tsing Hua University
Title of Paper (Panellist #3)		
Assessing a Delayed Truth Commission: Achievements and Challenges of the Taiwanese Transitional Justice Commission and the Follow-up Measures		
Abstract (Panellist #3)		
<p>In January 2016, the Democratic Progressive Party in Taiwan achieved an unprecedented victory by winning both presidential and parliamentary elections. With high hopes for reform, victims of past human rights violations made strong demands for truth, justice, and reparations. A new era of transitional justice commenced when President Tsai Ing-wen assumed office on May 20, 2016. President Tsai has since initiated a few initiatives, including advancing the “Act on Promoting Transitional Justice,” which established an institutional framework for addressing transitional justice issues. In December 2017, this Act established the “Commission for Transitional Justice” within the Executive Yuan. The Commission was vested with the authority to recover and categorize political archives, remove authoritarian symbols, rectify judicial wrongs, and promote social reconciliation. Upon the completion of its mandate, the Commission was dissolved on May 31, 2022, after releasing a final report that recommended a series of follow-up mechanisms and policies to be implemented by the Executive Yuan. Subsequently, transitional justice programs were assigned to various ministries within the Executive Yuan. Furthermore, the Division for Human rights and Transitional Justice was established under the Prime Minister of the Executive Yuan. Against this backdrop, this paper is aimed at examining the achievements of the Taiwanese Transitional Justice Commission and the challenges currently faced by the follow-up measures. The paper argues that the Commission has made significant progress by overturning criminal judgments rendered by military tribunals during the White Terror Period. Moreover, the current follow-up arrangement may facilitate the acquisition of administrative or political resources to implement the recommendations of the final reports of the Commission. However, concerns persist, including whether the Human Rights and Transitional Justice Division has sufficient capacity to coordinate and integrate the ministries and officials in charge of these ministries possess the professional knowledge and ability necessary to address transitional justice issues.</p>		
Brief Biography of Author (Panellist #3)		
<p>Yi-Li Lee is Assistant Professor at Institute of Law for Science and Technology of National Tsing Hua University. She holds a Ph.D. from the College of Law at National Taiwan University. In 2016, she was awarded a Fulbright Scholarship to conduct the post-doc program at Harvard Law School Human Right Program and East Asian Legal Studies. Her academic interests cover a variety of topics, including digital rights and constitutionalism, transitional justice, comparative constitutional law, international human rights law, international humanitarian law and international criminal law. Her recent publication appears in journals such as International Journal of Human Rights, Law & Ethics of Human Rights, Asian Journal of Law and Society, and National Taiwan University Law Journal (Chinese).</p>		

Name of Author	:	Bryan Dennis Gabito Tiojanco (Panellist #4)
Designation / Academic Post	:	Associate Professor
Institution / Organisation	:	The University of Tokyo, Graduate Schools for Law and Politics
Title of Paper (Panellist #4)		
Dworkin's Vulcan: Narrative Consistency in Constitutional Reasoning		
Abstract (Panellist #4)		
<p>Ronald Dworkin famously likened integrity in law to Neptune, the planet in our solar system Urbain Leverrier had postulated before astronomers saw it. Just as the observed orbit of Uranus could be explained only by the existence of Neptune, the legal reasoning of judges could be explained only by the political ideal of integrity. But Leverrier had also used the same gravitational theory to mistakenly postulate the existence of another solar system planet: Vulcan. In this essay I show several instances contradicting Dworkin's postulate that legal reasoning follows normative consistency. Normative consistency, I argue, is Dworkin's Vulcan. In the instances mentioned constitutional reasoning followed not normative but narrative consistency. Dworkin had placed narrative consistency in the realm of literature, normative consistency in the realm of law. This tracks the unease of legal and constitutional theory in accepting stories as a legitimate ground of law. But there is a school of legal thought inspired by Robert Cover whose premise is that beneath any constitutional interpretation is a story, a narrative of political identity. Call it legal narrativism. Using the Philippine Constitution as an example I show that retelling the constitutional story can radically alter constitutional meanings while maintaining adherence to accepted modes of constitutional argument.</p>		
Brief Biography of Author (Panellist #4)		
<p>I am a Project Associate Professor of Transnational Law at the University of Tokyo Graduate Schools for Law and Politics. I hold a JSD and LLM from Yale Law School and a JD (cum laude) from the University of the Philippines. I specialize in comparative constitutional law and theory, Philippine constitutional law and history, and transnational law. At present I am writing the Philippine volume for Hart Publishing's book series, Constitutional Systems of the World.</p>		

Name of Author	:	ETO, Shohei (Panellist #5)
Designation / Academic Post	:	Associate Professor
Institution / Organisation	:	Hitotsubashi University
Title of Paper (Panellist #5)		
Exploring Committed Constitutionalism: Robert Cover and the Japanese Constitution		
Abstract (Panellist #5)		
<p>It's been over 40 years since Robert Cover's "Nomos and Narrative" was published. Cover criticized the concept of law as a form of social control, highlighting its destructive (jurispathic) aspects. He argued that law's source lies in nomos and envisioned a narrative that empowers nomos with the ability for legal creation (jurisgenesis), recognizing the potential of law within that narrative. This discussion holds relevance for the Japanese Constitution, nearing its 80th anniversary. Post-World War II, Japan adopted a new constitution with liberal principles, but the reality of Japanese society has leaned towards social control rather than legal creation, almost suppressing the potential of that constitution. As proof, the communities Cover identified as carriers of narrative haven't flourished, and social movements are practically nonexistent. Concurrently, the courts, assumed guardians of the constitution, have hindered legal creation by avoiding interpretative commitments. Consequently, contemporary Japan is undergoing a decline both spiritually and economically, producing obedient individuals while fostering the growth of exclusionary nationalism. My goal is to reassess the concept of Cover's Committed Constitutionalism, using contemporary Japan as an example, to comprehend its significance in the context of modern Japan.</p>		
Brief Biography of Author (Panellist #5)		
<p>Shohei Eto has been serving as an Associate Professor of Law at Hitotsubashi National University in Tokyo since 2021. His areas of expertise encompass constitutional law, legal philosophy, and legal history. After graduating with Magna cum laude honors from the University of Tokyo Law School in 2008, he embarked on his professional journey as an Associate Attorney at Nagashima Ohno & Tsunematsu, specializing in corporate law and M&A. In 2011, he was recognized as a Fulbright Scholar and completed his LL.M at Columbia Law School in 2012. Following that, he held a position as a research associate at the University of Tokyo from 2012 to 2015 and served as a special lecturer there in 2015-2016. From 2016 to 2020, he assumed the role of associate professor at the Faculty of Law at Sophia University. He was a visiting researcher at the University of Sydney from 2022-2023. His current research involves exploring the development of American constitutionalism, offering comparisons with the landscape of Japanese constitutionalism.</p>		