Introduction to SEA legal systems

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Outline

Context: pluralism and colonialism

Illiberal constitutionalism and developing/maturing democracies
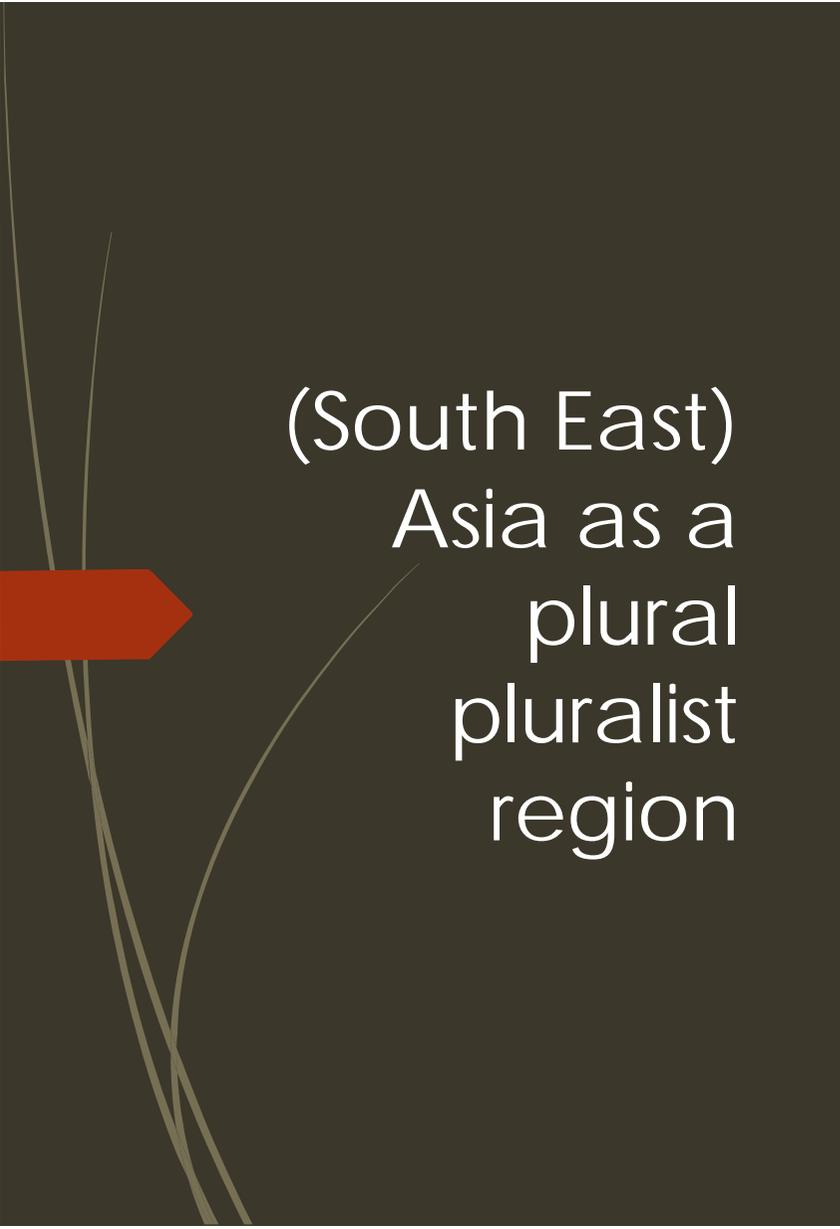
Separation of powers and concerns

Civil-common law divide

Regional integration and ASEAN

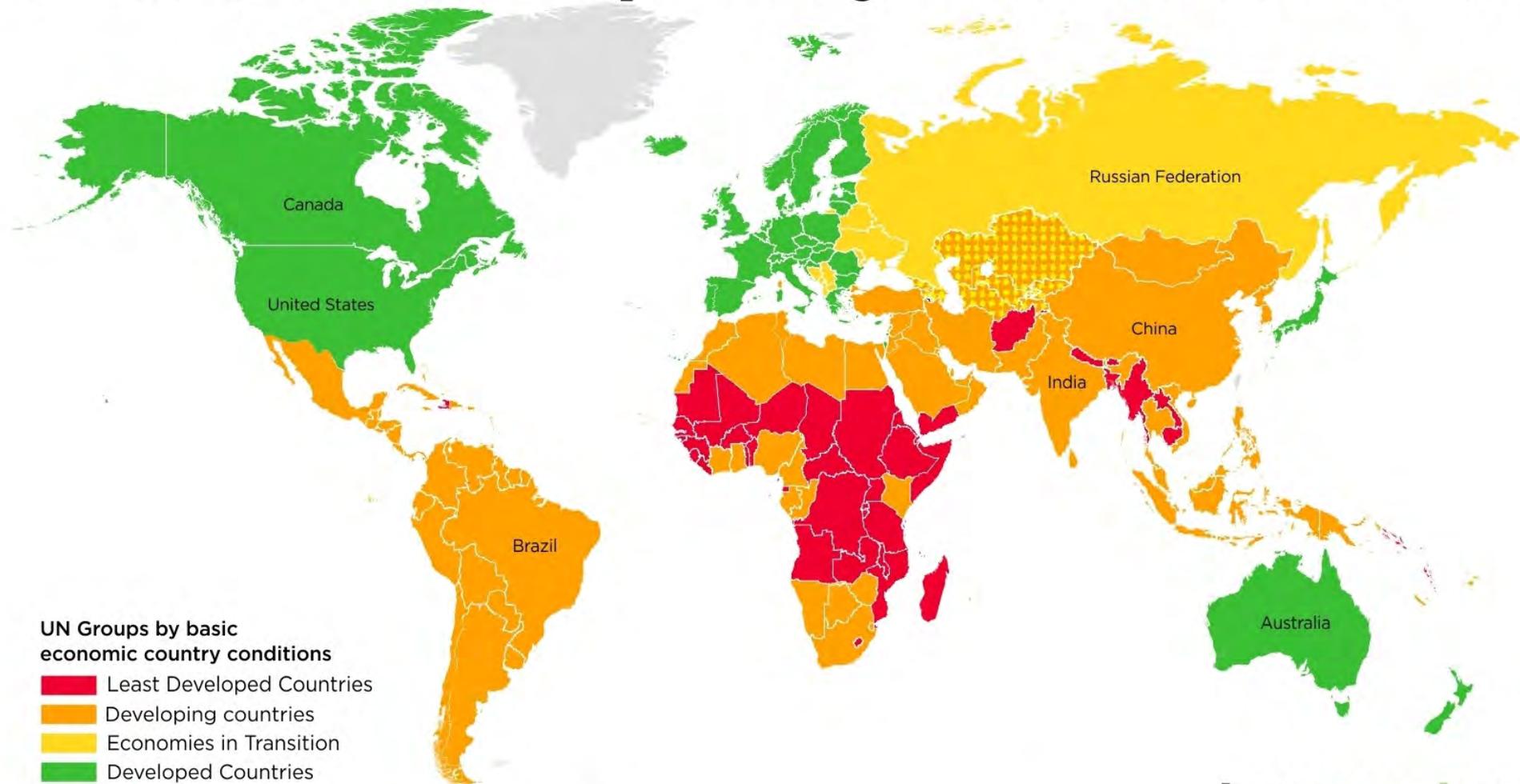# (South East) Asia as a plural pluralist region

- Ethnic
- Religious
- Linguistic
- Economic
- Political

Countries Grouped by United Nations

Canada

United States

Russian Federation

China
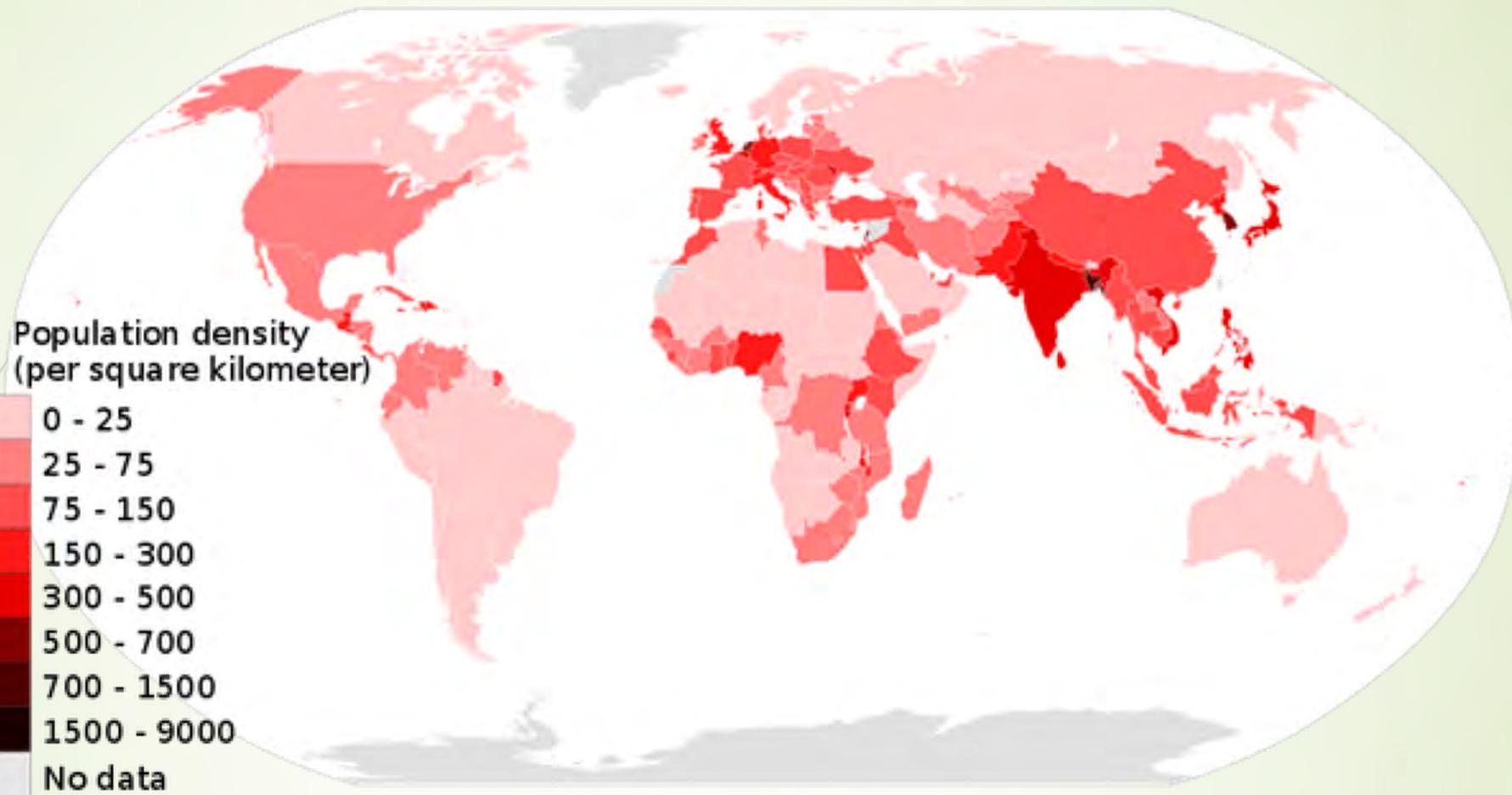
India

Brazil

Australia

**UN Groups by basic
economic country conditions**

- Least Developed Countries
- Developing countries
- Economies in Transition
- Developed Countries

Source: http://www.howmuch.net/articles/countries-groups-by-united-nations

howmuch ^{net}

Population density
(per square kilometer)

- 0 - 25
- 25 - 75
- 75 - 150
- 150 - 300
- 300 - 500
- 500 - 700
- 700 - 1500
- 1500 - 9000
- No data

Two-thirds worldwide use the internet, but fewer do in Africa and South Asia

Percent of adults who use the internet at least occasionally or report owning a smartphone

Germany **85** Poland **69**
Russia **72**
Canada **90**
UK **88**
Ukraine **60**
France **75**
Spain **87** Turkey **72**
China **65**
Japan **69**
U.S. **89**
Italy **72** Pakistan **15**
South Korea **94**
India **22**
Vietnam **50**
Burkina Faso **18**
Philippines **40**
Venezuela **67**
Senegal **31**
Malaysia **68**
Mexico **54**
Ethiopia **8**
Lebanon **66**
Ghana **25** Uganda **11** Kenya **40**
Indonesia **30**
Nigeria **39** Tanzania **21**
Peru **52** Brazil **60**
Jordan **67**
Australia **93**
Chile **78**
South Africa **42**
Israel **86** Palest. ter. **72**
Argentina **71**

LESS INTERNET ACCESS 0 20 40 60 80 100% MORE INTERNET ACCESS

67%
GLOBAL MEDIAN

Note: Percentages based on total sample.

Source: Spring 2015 Global Attitudes survey. Q70 & Q72.

PEW RESEARCH CENTER

North America	2015-16 position
California Institute of Technology	1
Stanford University	3
Massachusetts Institute of Technology	5

UK	2015-16 position
University of Oxford	2
University of Cambridge	4
Imperial College London	8

Europe (excluding UK)	2015-16 position
ETH Zurich – Swiss Federal Institute of Technology Zurich	9
Karolinska Institute	28
LMU Munich	29

Asia	2015-16 position
National University of Singapore	26
Peking University	42
University of Tokyo	43
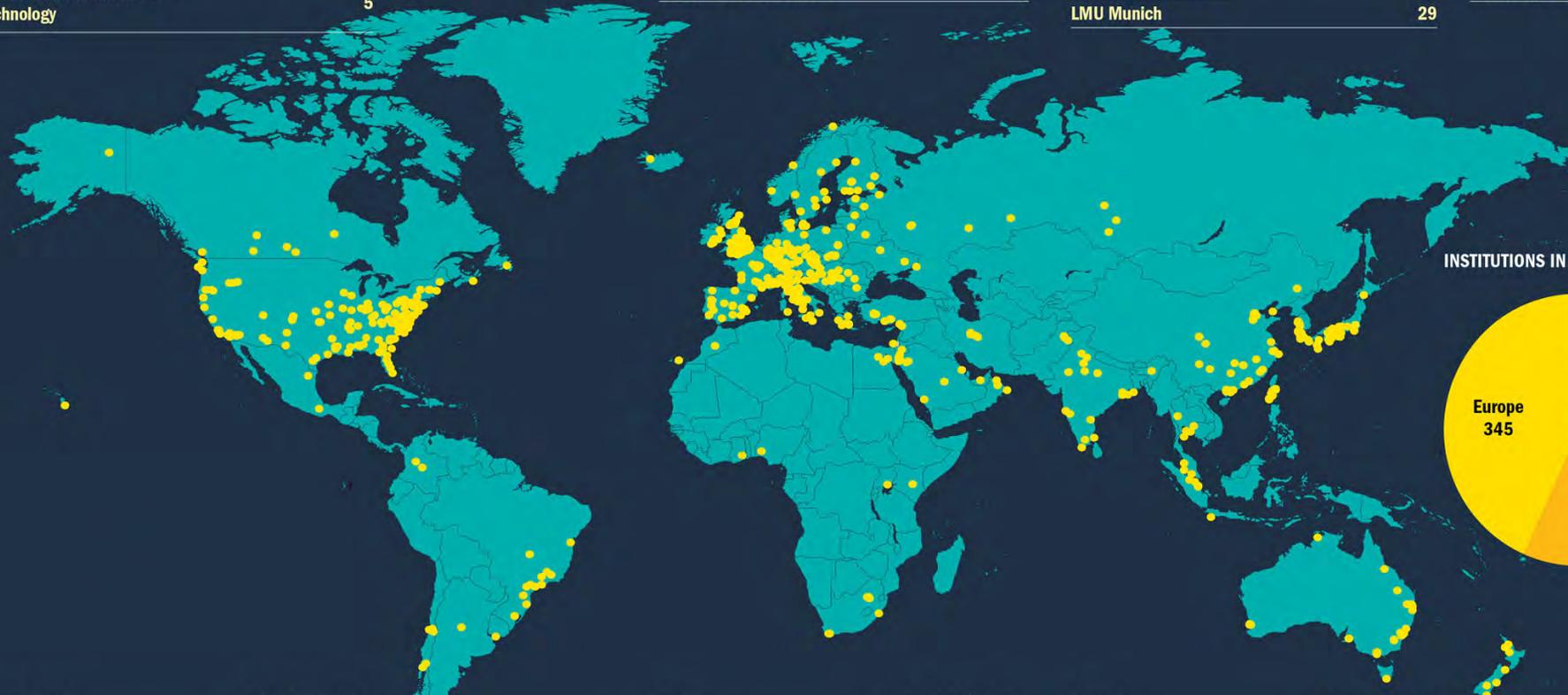
INSTITUTIONS IN TOP 800 BY REGION*

North America 174
Europe 345
Oceania 38
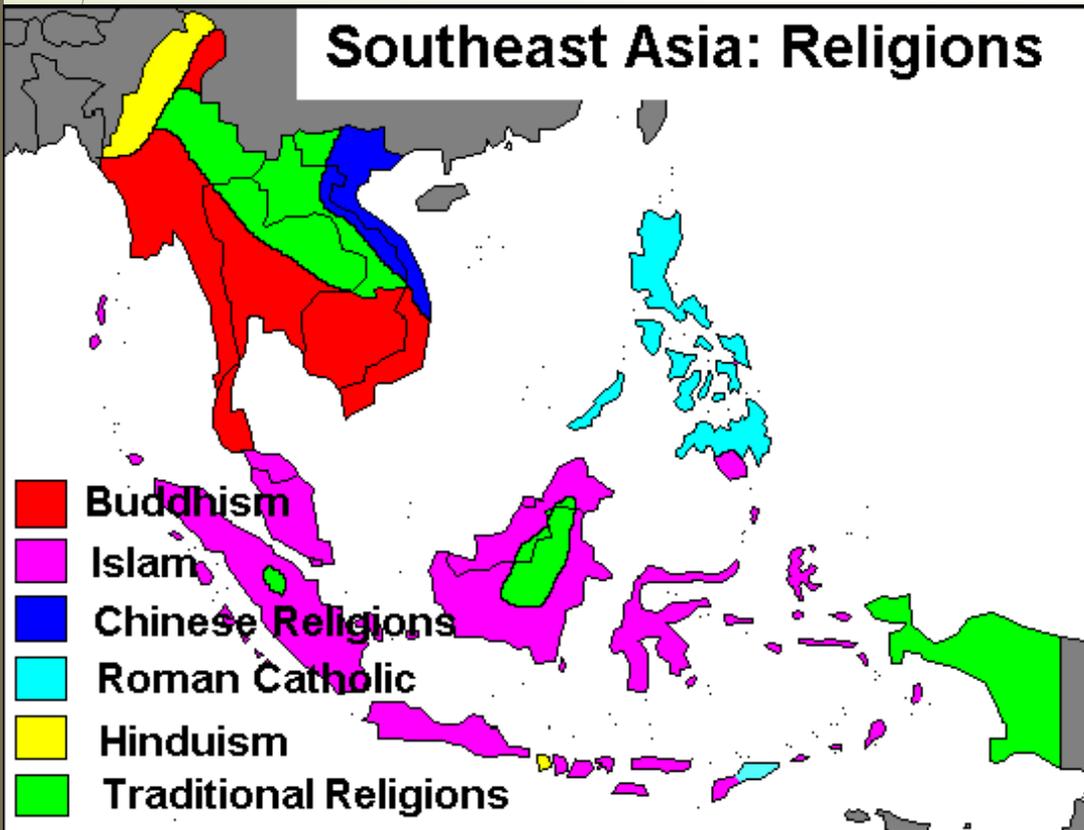South America 27
Africa 14
Asia 203
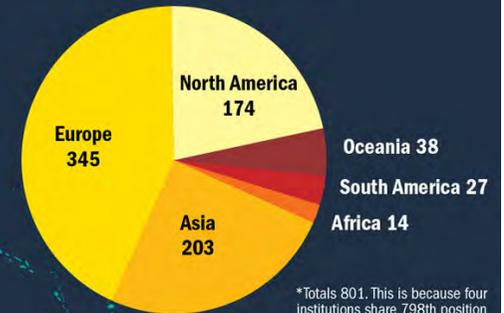
*Totals 801. This is because four institutions share 798th position

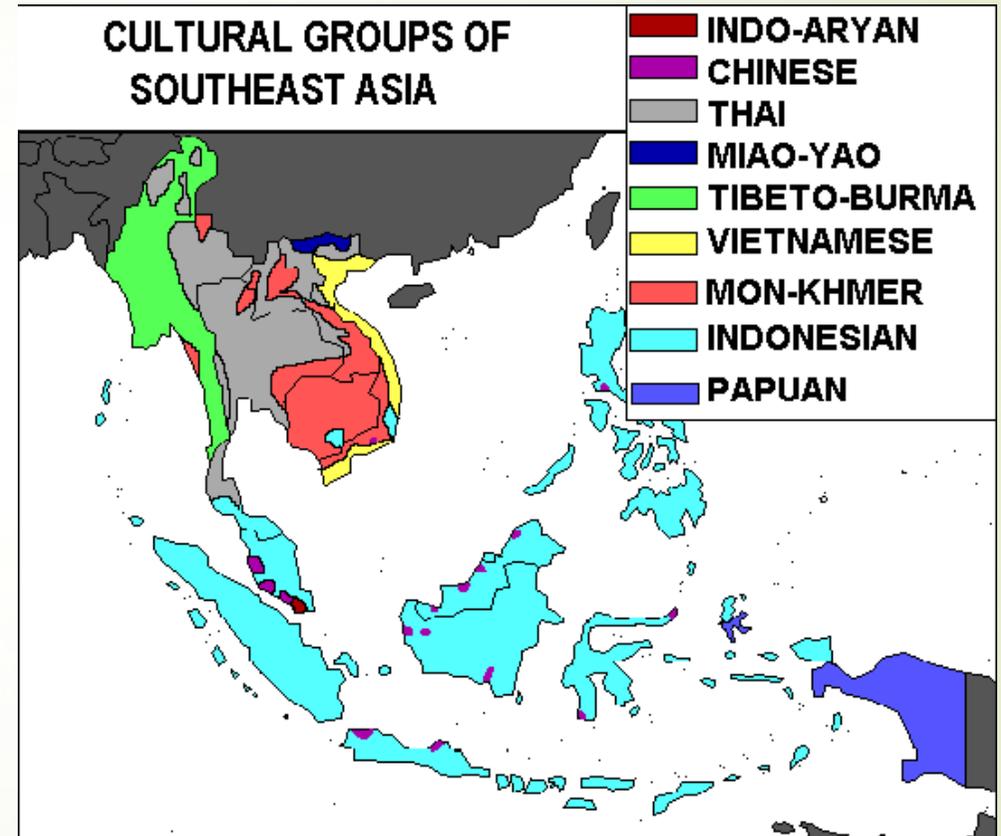| South America	2015-16 position
University of São Paulo	251-300
University of Palermo, Argentina	351-400
State University of Campinas	351-400

Africa	2015-16 position
University of Cape Town	=120
University of the Witwatersrand	201-250
Stellenbosch University	301-350

Oceania	2015-16 position
University of Melbourne	33
Australian National University	52
University of Sydney	=56

THE
timeshighereducation.com

Southeast Asia: Religions

- Buddhism
- Islam
- Chinese Religions
- Roman Catholic
- Hinduism
- Traditional Religions

CULTURAL GROUPS OF SOUTHEAST ASIA

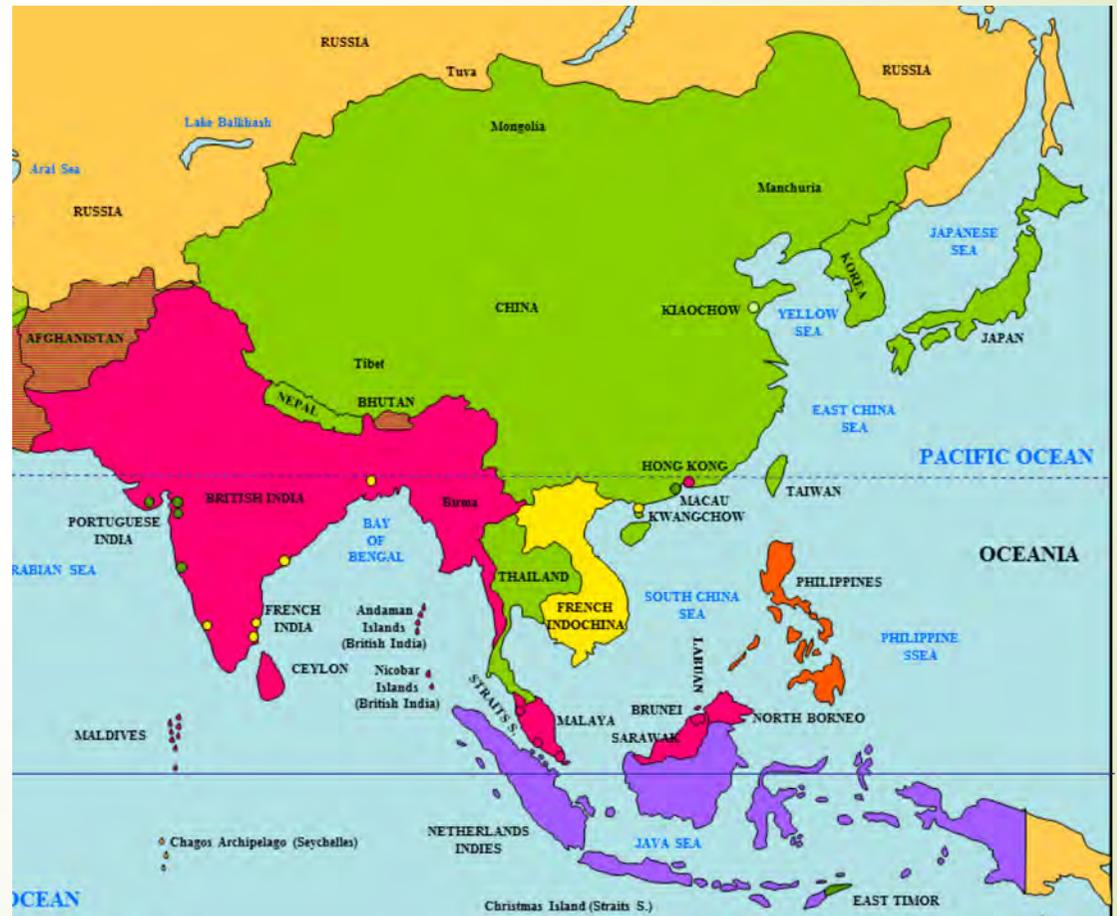- INDO-ARYAN
- CHINESE
- THAI
- MIAO-YAO
- TIBETO-BURMA
- VIETNAMESE
- MON-KHMER
- INDONESIAN
- PAPUAN

Historical contingencies: colonialization

Colonial control across most of the region during 19th/early 20th century

Even non-colonized countries not immune from 'Western' influences/pressures

Post-independence developments

- Post WWII: brief flowering of liberal parliamentary constitutionalism

- 1960s-1970s: defining period of Asian Developmental State
  - "The Asian Developmental State typically embodied all or most of: executive-centred government, uncontrolled administrative discretion; strong or unquestionable personal or party rule; government interference in economic and social affairs; restriction of basic freedoms, the media, elements of political opposition and judicial and legal professional independence; persistent attacks on or total submergence of the rule of law; and the backing of a powerful military branch."
  - Drivers: the 'red scare' (cf. McCarthyism); developmental imperatives

- New Asian constitutionalism (post-1989 era)
  - People power, democratic revolutions (e.g. Indonesia, South Korea, Taiwan)
  - But sometimes regressive developments (e.g. Thailand, Philippines)

Legacy issues

- Constitutional arrangements: e.g. Westminster system
- Legal culture:
  - Executive domination,
  - Respect for authority
  - Premium placed on social stability and security
  - Perception of law's relevance in organizing society and economy
- Developmental imperative and role of the State in fostering economic growth
- Legal tradition: civil v common (more later)
- Relatively young legal systems, no common legal heritage – contrast Western Europe, US

Illiberal constitutionalism

- Stronger presence of the State and (moral) values in public law

- Contrast liberal (Western) constitutionalism: normative individualism, 'neutral' state

- Two versions (cf. Thio)
  - Communitarian
  - Theocratic

Communitarian constitutionalism

1

- ➦ Pre-eminence of collectivists values, e.g. social harmony, cultural identity, patriotism, economic development
    - ➦ "Thick" conception of the "good society" expressed in Constitution or related documents
    - ➦ Incl. environmental conservation

- ➦ Discourse centred on responsibilities, public goods rather than individual autonomy, rights

- ➦ Often results in strong States (governments) to keep the nation on course in realizing the community ideals

Theocratic constitutionalism

- Breaks "public domain = secular v private domain = religion" dichotomy

- No single approach: spectrum of State/religion arrangements

- Example: Malaysia

  - Art 3(1): "Islam is the religion of the federation; but other religions may be practiced in peace and harmony".

  - Art 11(1) and (4): right to profess and practice religion, BUT legislation "may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam."

  - Art 112(1A): regular courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."

  - Art 160(2): "Malay means a person who professes the religion of Islam…"

Separation of powers

- Linked to Rule of Law, democracy, constitutionalism (contrast absolutist rule)
- Classic trias politica: legislature, executive and judiciary

- Structuring the relationship between the branches
  - Autonomy and inter-dependence, checks and balances
  - Executive-legislature: parliamentary v presidential systems
    - Note: hybrids (e.g. Indonesia)
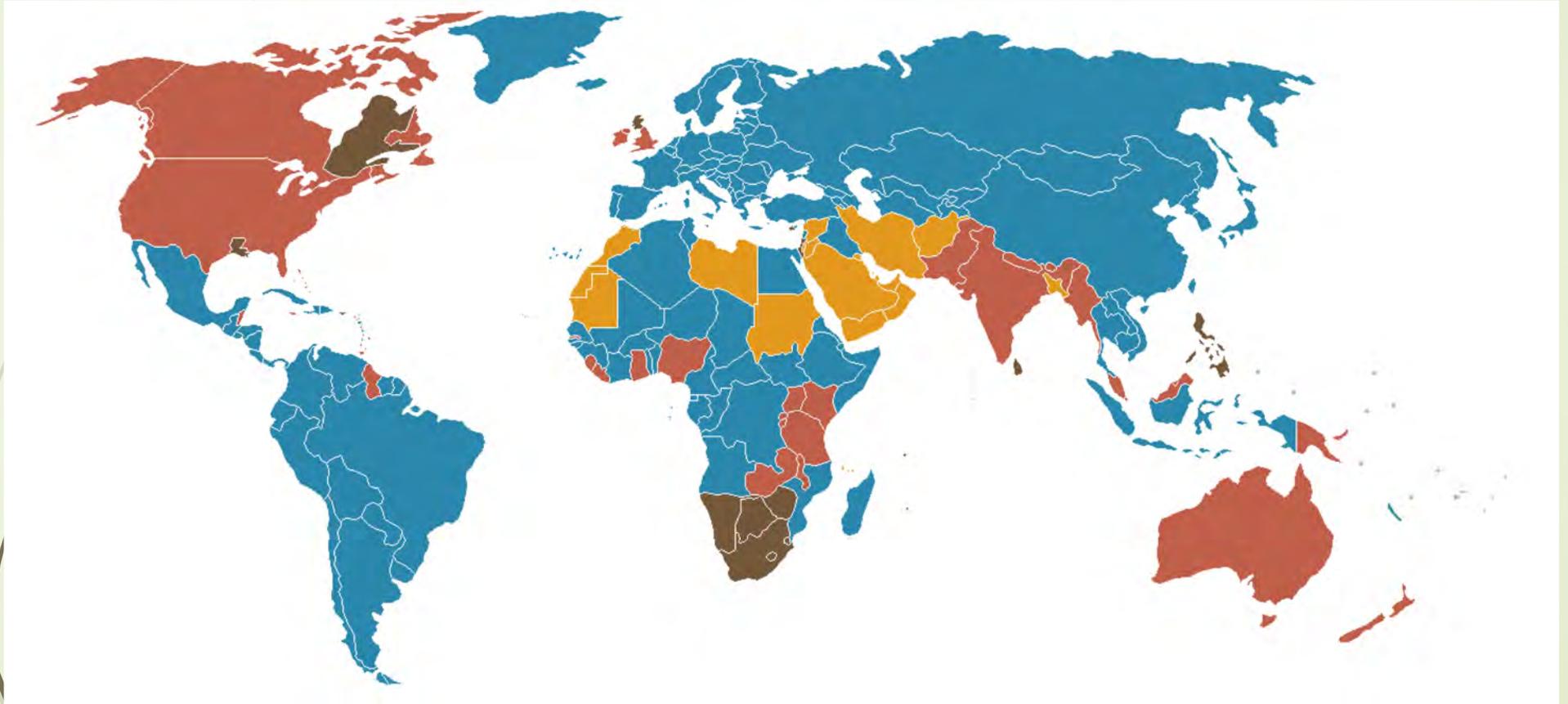
Concerns

- Dominance of forces beyond the conventional trias politica
  - Monarchy: e.g. Thailand, Japan, Malaysia
  - Military: e.g. Myanmar, Thailand, Philippines
  - Political parties: Communist regimes (China, Vietnam, Laos) and beyond (e.g. Japan, Singapore)

- Judicial independence

- Corruption / weak enforcement of legislation

Civil-common law divide

Transplantation of legal traditions

- Colonial legacy for most of (South East) Asia

- Japan, China, Thailand: 'voluntary' adoption, preference for civil law tradition

- Myanmar, Hong Kong: reasserting and maintaining membership of the common law family

Sources of law and legal method

- Statute v case law
  - Ideology of codification as opposed to amount and degree of authority of legislation
  - Positivism and separation of powers
  - Stare decisis /ratio – but note *jurisprudence constante*, 'guiding cases'

- Custom

- Role of doctrine

Ways of thinking

- Inductive v deductive

- Facts v principles

- Equity / pragmatism v rules/formalism
  - "Legal minds in civil-law jurisdictions like to think that their system is more stable and fairer than common-law systems, because laws are stated explicitly and are easier to discern. But English lawyers take pride in the flexibility of their system, because it can quickly adapt to circumstance without the need for Parliament to enact legislation." [The Economist Explains, 16 July 2013]

Judges and judicial organization

- Creative developer of legal rules v. "mouthpiece of the law"
  - Note open-ended provisions in civilian codes, e.g. Art 9 Philippines CC: "No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws."
  - But enduring dominant folklore

- Education and career

- Judicial organization and specialization
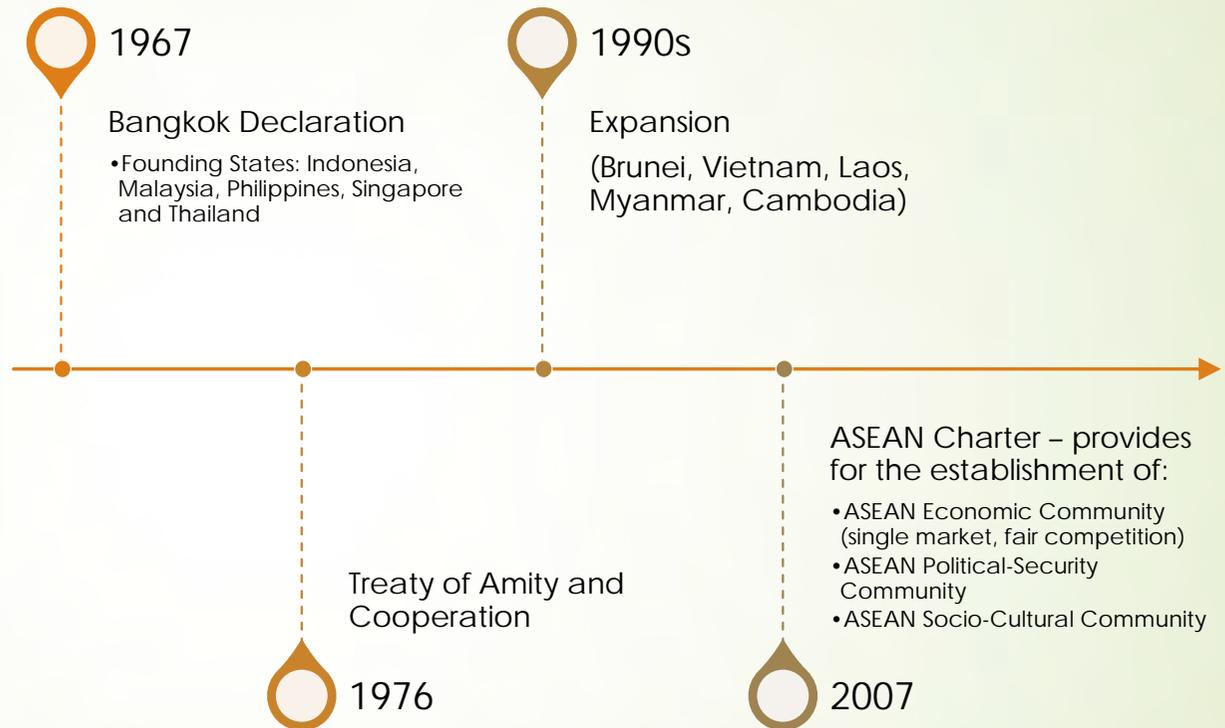 - Bifurcated structures in civil law countries: regular / administrative courts

Beyond the civil-common law dichotomy

- Classic mix: common/civil
  - Philippines

- Contemporary mixes:
  - Indonesia, Malaysia, Singapore, Brunei, Sri Lanka….
  - Reflects customary ('*adat*') origins of home-grown legal order
  - Prominent position for religious norms and institutional structures alongside secular rules and structures

Regional integration: asean

Evolution

1967

Bangkok Declaration
- Founding States: Indonesia, Malaysia, Philippines, Singapore and Thailand

1990s

Expansion

(Brunei, Vietnam, Laos, Myanmar, Cambodia)

Treaty of Amity and Cooperation

1976

ASEAN Charter – provides for the establishment of:
- ASEAN Economic Community (single market, fair competition)
- ASEAN Political-Security Community
- ASEAN Socio-Cultural Community

2007

Governance framework

Chaired by rotating presidency, supported by secretariat (Jakarta)

ASEAN Summit

ASEAN Community Councils and Sectoral Ministerial Bodies

Consultation and consensus

Non-intervention (e.g. Myanmar) and political/peaceful resolution of conflicts

Challenges

- Weak institutional infrastructure
- Weak enforcement and dispute resolution mechanisms
- Diverging national priorities
- Pluralism (political, economic, social, legal)
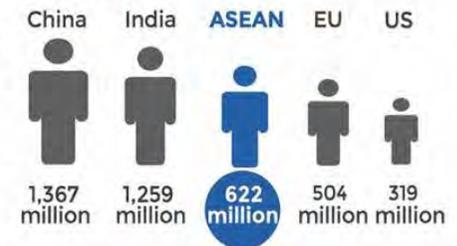- Dealing with China and South China Sea maritime claims

Prospects