

**CONFUCIAN CONSTITUTIONALISM?
THE EMERGENCE OF CONSTITUTIONAL
REVIEW IN KOREA AND TAIWAN**

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Abstract: This paper documents the recent emergence of constitutional review of legislative and administrative action in Korea and Taiwan, two East Asian countries seen to be historically resistant to notions of judicial activism and constitutional constraint. It argues that the ability to draw from foreign legal traditions, especially those of the United States and Germany, empowered judges in these countries and therefore helped to alter the structure of public law away from executive-centered approaches of the past. This is consistent with viewing judicial review as essentially a foreign transplant. Nevertheless, the institution of judicial review has some compatibilities with Confucian legal tradition, a point that has implications for how we think about institutional transfers across borders. By constructing a locally legitimate account of what is undeniably a modern institution of foreign origin, the paper argues that constitutional constraint should not be viewed as an imposition of Western norms, but as a more complex process of adaptation and institutional transformation.

INTRODUCTION

Judicial review has become a global phenomenon. In the past two decades, carried by a wave of democratization, many countries have adopted systems of judicial review for the first time. In other countries, long-dormant constitutional courts have been

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revitalized. Judicial review has become fundamentally entrenched in the architecture of modern democracy, notwithstanding concerns among constitutional theorists of a counter-majoritarian difficulty.

The spread of judicial review has entailed its entry into new cultural environments. Originally rooted in notions of higher law originating in the Judeo-Christian tradition, judicial review would in one view be limited to countries subject to strong European influence (Unger 1976; Huntington 1997; see also Cappelletti 1989). In particular, judicial review would seem to be difficult to establish in countries with a Confucian legal tradition, which is commonly characterized as emphasizing social order over individual autonomy and responsibilities over rights (Bodde and Morris 1967; Choi 1980, 70; Nathan 1989). In the Chinese legal tradition, as conventionally interpreted, law exists not to empower and protect individuals from the State, but as an instrument of governmental control. Any rights that do exist are granted by the state and may be retracted. So the notion of a court constraining the state in the name of rights would appear to be anathema.

All the more remarkable, then, is the flourishing of judicial review in Korea and Taiwan in the 1990s. Korea and Taiwan are two of the most remarkable success stories of the Third Wave of democracy. Beginning in the mid-1980s, authoritarian governments in both countries negotiated a transition to democracy, culminating in the recent elections of longtime dissidents Kim Dae Jung and Chen Shui-bian as Presidents. These developments have received acclaim in the region and beyond. Less studied is the emergence of constitutional courts in both countries, demonstrating the flexibility of

judicial review in entering new cultural environments.¹ This story may therefore have implications for the future development of judicial review in other political systems in the Confucian cultural sphere, especially China.²

More broadly, this story of institutional revitalization holds broader lessons for the spread of legal institutions of Western origin. Much of comparative law literature has focused on the spread of norms and institutions through a process of “legal transplants”, primarily among Western legal systems (Watson 1991, 1993; Ewald 1995; cf. Abel 1982). The question of transferability of legal institutions to non-Western societies is less clear (Petchsiri 1987). The issue is particularly acute now that the “new” law and development movement has begun to focus on the quality of judicial systems, rather than substantive law (Trubek 1996; Ginsburg 2000). Can public law institutions transfer across quite different cultural contexts? If so, must they be transformed and domesticated

¹ One might argue that this point was already well demonstrated by the establishment of judicial review in Japan in the 1947 Constitution. Yet, for reasons having to do with domestic politics, the process of judicial appointments and the longstanding dominance of the Liberal Democratic Party in that country, judicial review in Japan has never fulfilled the promise of an active constraint on policymaking.

² The well-publicized 1999 dispute over the power of the Court of Final Appeal in Hong Kong was perhaps an indicator of future debates to come. The Court claimed the power to restrict application of decisions of the National People’s Congress in Beijing when they conflict with the Basic Law of Hong Kong. Ultimately, the Court reversed its position under pressure from Tung Chee-hwa, Chief Executive of Hong Kong. (Chan 1999; Gewirtz 2001).

in the process? Does the adoption of foreign norms, the goal of “law and development”, involve the imposition of Western forms on non-Western polities and societies or is there a more complex interchange that occurs?

This paper considers the story of judicial review in Korea and Taiwan in light of these questions. The paper begins with a discussion of traditional Confucian views of constitutionalism and law. The paper then describes the emergence of judicial review in Taiwan and Korea in Parts II and III. This section draws on empirical research conducted in the late 1990s involving interviews with constitutional court justices and analysis of constitutional cases. The primary presentation, however, is historical, as it describes the emergence of constitutional constraint in this seemingly unlikely environment. The focus is on both the *form* of constitutional review and on particular substantive *norms* introduced into the constitutional system through courts, often through explicit reference to foreign constitutional cases. Part IV considers the factors that have led to more active judicial review. This section argues that institutions can indeed transfer across cultural contexts, although they may undergo a process of domestication to fit local needs. The incorporation of Western norms of liberal constitutionalism should not be viewed only as an imposition of ideas from the first world to third. Instead it is part of a two-century process of institutional diffusion and transformation with potential to extend and transform the values of limited government and constitutionalism.

A caveat at the outset is in order about the use of the term Confucianism. Although both Korea and Taiwan historically have been influenced by Confucian thought (Choi 1980, 55; Hahm 1987; Palais 1996; Shaw 1981; Pye 1985; Beer 1979, 4), neither Korea nor Taiwan has been governed by a formally Confucian regime since the early

twentieth century.³ In any case, the precise level of Confucian influence on Taiwan, Korea, or any other society is not empirically verifiable. On the other hand, a large literature considers the interaction of traditional Confucian thought on governance processes in these societies (see e.g. Tu 1995; Bauer and Bell 1999; Fukuyama 2001; Huntington 1997). In this spirit, this paper draws on conventional views of imperial Chinese and Korean institutions to show that supposed incompatibilities with constitutionalism are not as severe as heretofore supposed. The emergence of constitutional review, therefore, may involve not only Westernization, but localization of a Western institutional form.

³ Most scholars agree that Confucianism has been highly influential in Korea. The case of Taiwan is more complex. Although it was a part of the imperial Chinese system that promoted Confucianism as official ideology, Confucian influence on Taiwan was less pervasive than on the mainland. After 1895, Chinese Confucian influence was subordinated under Japanese rule to State Shinto ideology and growing militarism. Some scholars therefore argue that Confucian influence was minimal on Taiwan. (Pye 1985). Others, including a prominent former Grand Justice, assert that Taiwan is a Confucian society. See Ma 1998. It is difficult to reconcile these two views. As the issue of Chinese and Confucian influences touches on the question of national identity, it is subject to intense contestation within Taiwan. Nevertheless, as Taiwan is universally acknowledged to be a part of the “greater Chinese cultural system,” it seems reasonable to consider the possible effects of the dominant Chinese legal and political philosophy on developments there.

I. CONFUCIANISM AND CONSTITUTIONALISM

Much of Northeast Asia has been influenced at one time or another by the Chinese Confucian tradition, a philosophy that originates in the 6th century B.C. Like other features of modern constitutionalism, constitutional review was not part of the traditional Chinese or Korean system of government. The notion of an intergovernmental check on the highest power is foreign to traditional Confucian thought. Power is indivisible in the Confucian worldview; there is no human force that can check the emperor's power if he enjoys the mandate of heaven. The emperor has "all-encompassing jurisdictional claims over the social-political life of the people" (Schwartz 1987, 1; see also King 1996, 230; Choi 1981, 57). The only human constraint on the emperor's power is the duty of scholar-officials to remonstrate the leader where he errs (a task for which they were sometimes beheaded.) This unified conception of power is a very different one from that of modern constitutionalism with its distrust of concentrated authority (Fox 1997; Ainsworth 1996).⁴

This is not to argue that the emperor was a completely unconstrained sovereign. Some constraints on the emperor's power in the Confucian tradition came from universal

⁴Of course, Confucianism offers a more general critique of law as a means of social ordering. For example, the Analects famously express disdain toward "guiding the people by edicts and keeping them in line with punishments." The classical opposition between *Fa* and *Li* is discussed in virtually every account of Chinese law. (See e.g., Bodde and Morris 1967; Ainsworth, 1996). *Li* refers to morality, custom and propriety, while *Fa* is usually translated as criminal law, but refers more broadly to formal rules backed by sanctions.

truths embodied in ancient teachings and particularly the core concept of *li* (rites or right behavior).⁵ Each person in a harmonious society must follow norms of proper behavior appropriate to their social role. These norms about appropriate behavior were not institutionalized in any meaningful sense. They were formal in that they were recorded, but were neither positively enacted nor judicially enforceable. There was no real concept of a right, although it must be recognized that any society with such well-developed notions of duty has at least implicit rights (cf. Feldman 2000).

In Chinese political philosophy, normative constraints on government were reflected in Mencius' notion that the Mandate of Heaven rested with the people. The emperor had no *right* to power, but rather a duty to rule in an ethical and moral fashion. If he failed to do so, the cosmos would show its displeasure, evidenced by natural disaster, famine and disorder. This idea placed some implicit limits on the power of the ruler, in that his rule would be judged by the welfare of the people. But this cosmic universalism contrasted with the individual-centered political philosophy of Rousseau, Locke and the Natural Rights theorists of 18th-century Europe. State and society in the Confucian tradition were viewed as an organic unity, in no sense forming an adversarial relationship. The people were not viewed as proper agents to exercise power over government; rather the government was assumed to be the legitimate voice of the people as a collectivity. Any failure on the part of the government in fulfilling this mandate had nothing to do with the expressed opinion of the people, but was evidenced by a material failure of production, reflecting a higher cosmic judgment on the rulers' performance.

⁵ Although the Korean Confucian tradition is distinct from the Chinese (De Bary 1985; Shaw 1981) the broad outlines of the tradition discussed here were similar.

This discussion illustrates the broader point that law in the Imperial Chinese worldview came to be viewed not as a device to constrain government but primarily as an instrument of state power (Bodde and Morris 1967). The traditional attitude can be characterized as rule by law, as opposed to the rule of law (see e.g. Beresford 1995, 911).⁶ Although there were elaborate systems of appeal to constrain lower officials who implemented the law, Confucian notions of moral leadership did not allow for similar constraints on the lawmaking power itself. Both the Confucian emphasis on the morality of leadership, and the notion of law as an instrument of effective governance rather than a constraint on government, would seem to impede the development of judicial review of legislation in a Chinese or Korean context.

Until the mid-1980s, scholars could point to governance in Asia and find elements that strongly resonated with the above description of Confucian thought (Pye 1985; Seow 1995; Keith 1994, 15-18, 39-54). Both Korea and Taiwan, for example, remained under the rule of strong authoritarian regimes, with a highly trained state apparatus that was given broad discretion, and neither country could have been considered a democracy in any meaningful sense. Both countries had lived for many years under dictators that self-

⁶ Some scholars have recently contested this view by demonstrating that there was more civil law in Imperial China than generally acknowledged (Bernhardt and Huang 1994; Huang 1996). Although they demonstrate that Imperial Chinese law was not exclusively public in orientation, they do not contest the view that law was not used to constrain the sovereign itself.

consciously sought to draw on the Confucian tradition for legitimation.⁷ Although both countries had formally modern legal systems bequeathed to them by Japanese colonialism, neither had an established mechanism for constraining government policies, and law remained relatively unimportant as a means of social ordering, at least outside the economic sphere (Choi 1980, 73-86).

II. JUDICIAL REVIEW ON TAIWAN

The power of judicial review has formally existed since the establishment of the Republic of China (ROC) on mainland China in the late 1940s. The power lies with the Council of Grand Justices of the Judicial Yuan, whose primary functions are to issue uniform interpretations of law and to interpret the Constitution.⁸ Under the 1947 Constitution, the Council was composed of seventeen members who are appointed by the President with approval of the Control Yuan (a separate branch of Government) for renewable nine-year terms.⁹ Constitutional amendments in 1997 lowered the number of

⁷ Chiang Kai-shek, Chiang Ching-kuo and Lee Teng-hui in Taiwan, and Park Chung Hee in Korea, all drew on Confucian imagery at various points.

⁸ Under the 1947 Constitution there are five branches of government (yuan), three corresponding to the Montesquieuan framework and two drawn from the Chinese imperial tradition, the Control Yuan for audit and the Examination Yuan for entry into the civil service.

⁹ Although Article 81 of the Constitution grants “judges” life tenure, the Grand Justices are not considered to fall into that category.

Grand Justices to fifteen, shortened the terms to eight years, and provided for staggered appointments that coincide with the four-year presidential election cycle.¹⁰

The Council has historically been a quiet institution, no surprise given the authoritarian regime established by the Kuomintang (KMT) after its retreat to Taiwan in 1949. This regime was established after its defeat on the mainland by the communist forces of the People's Republic of China. During the civil war, the ROC government passed "Temporary Provisions Effective During the Period of Communist Rebellion". These "Temporary Provisions" suspended many provisions of the Constitution, facilitated the declaration of martial law, and concentrated power in the Presidency until their removal in 1991. The Temporary Provisions reflected the state of tension between China and Taiwan: a central element of the KMT regime was its claim to be the legitimate government for all of China, and this was to shape the authoritarian period and the pattern of liberalization.¹¹

After some early efforts to constrain the exercise of political power, the Grand Justices were disciplined by the legislature in the late 1950s through a limitation on their jurisdiction. From that time until the recent liberalization, the Justices were cautious. Indeed, in the early era, the Council can be seen as an instrument of the KMT regime. It

¹⁰ Additional Articles of the Constitution of the Republic of China, Article 5. The Article also provides that the Judicial Yuan's draft budget may not be eliminated or reduced by the Executive Yuan in their submission of the budget to the Legislative Yuan.

¹¹ The KMT regime was in some sense a regime of occupation on Taiwan, as most of its supporters were part of the small portion of the population that relocated from the mainland in 1949.

never accepted a case on the (dubious) constitutionality of the Temporary Provisions, and issued a number of decisions that facilitated KMT rule within the confines of at least nominal constitutionalism.

Most prominently, the KMT needed help when it became clear that it would be unable to retake Mainland China in the near future as it had hoped. The National Assembly, the highest body in the ROC constitutional scheme, had been elected on the mainland. But without control of the mainland, new elections could not be held. The KMT could have held elections on Taiwan only, but this would be to destroy the fiction that it was the legitimate government for all of China. Furthermore, much of the KMT's legitimacy in the eyes of the American government was as the government of "Free China" so completely foregoing elections would not look good. The KMT thus needed to come up with a constitutional means of suspending elections.

The Council of Grand Justices provided a convenient solution to the problem. The government asked the Council to give constitutional sanction to a suspension of elections, and the Council obliged in Interpretation No. 31 of January 29, 1954. The Council held unanimously that, so long as mainland electoral districts remained in the hands of the Communist enemy, elections could be suspended until the territories were recovered. The decision referred to "unforeseen events" that had occurred, forcing the representatives to continue serving so as to save the constitutional system. These National Assembly members were to serve for over forty years without standing for re-election, and constituted a key barrier to democratic reforms in the late 1980s.

Taiwan was ruled with an iron hand by Chiang Kai-shek for much of this period, relying on martial law and the Temporary Provisions' suspension of the constitutional

two-term limitation on the Presidency. After Chiang's death, his son Chiang Ching-kuo succeeded him as President. The younger Chiang sought to "Taiwanize" the KMT, and promoted Taiwan-born Lee Teng-hui as his Vice-President and successor. Liberalization began in Taiwan with a famous speech by Chiang Ching-kuo in 1986. Chiang was interested in reforming the system so as to advance the paradigmatic goal of reunification with the mainland. He decided the answer to the problem of reunification lay in deepening Taiwan's democracy, then transferring the experience to the areas under PRC control (Chao and Myers 1998, 112). At the KMT's Third Plenum in March 1986, Chiang announced these ideas in a speech that proposed to "initiate democratic constitutional government ... return political power to the people; and make them entirely equal before the law." (Chao and Myers 1998, 126). This speech signaled the beginning of a long and steady reform period. Opposition parties were legalized and many constraints on public discourse removed. The dynamic of the period was one of continual demands by opposition politicians, followed by co-optation and liberalization by the mainstream faction of the KMT.

A major barrier to reform was the continuing presence of the National Assembly members elected on the mainland. Since the Assembly was the body solely responsible for constitutional amendment, it had an effective veto over efforts to abolish it, as well as to undertake other institutional reforms desired by the reformers. While it would theoretically be possible for the so-called "old thieves" to continue to serve in the National Assembly until they all died, this would do little to renew the legitimacy of the KMT as a Taiwan-based party. The party needed to find a way to encourage the National Assembly members to retire. The KMT began in 1987 to devise a plan to secure the

retirement of the old thieves, including a law to compensate the old representatives passed in early 1990 (Chao and Myers 1996, 154). Nevertheless, it was far from clear the “old thieves” would retire peacefully. The KMT brought a court case before the Grand Justices to resolve the problem.

Interpretation No. 261, announced on June 21, 1990, overturned Interpretation No. 31 and forced the retirement of the “old thieves.” It called for new elections to be held. This was undoubtedly the most important case in the history of the Council of Grand Justices and removed the last legal barrier to rapid institutional reform in the ROC. Because the decision overturned an earlier Council case, the rhetoric of Interpretation No. 261 was conditioned by that of Interpretation No. 31 and its reference to the “unforeseen events” that had forced the representatives to continue serving so as to save the constitutional system. Interpretation No. 261 recalled the initial decision as preserving the “one-China paradigm,” but also noted that regular re-election was needed to reflect the people’s will. The conflict was thus framed as being between a formalist constitutionalism adopted in the early 1950s against the needs of the “democratic constitutional system” to respond to newer developments. The Interpretation went on to provide for the immediate discharge of those representatives unable to exercise their duties, and provided a deadline for the retirement of the others. It then called for a new election in accordance with the “spirit of the constitution.”

There is no doubt the decision marked a significant turning point, providing an authoritative pronouncement of the continued democratization of the ROC. Without the decision of the Grand Justices, the democratization process would have remained at a standstill, with the possible consequence that then-President Lee Teng-hui would never

have cultivated his strong position within the KMT, and reform would be delayed indefinitely.

The Council has been much more active since 1990 in dismantling the tools of authoritarianism and expressing the new values of Taiwan's leadership. The gradual nature of the democratic transition left much old legislation and many administrative regulations intact from the authoritarian period. By striking these one at a time, the Council has become the instrument of the new Taiwan. The Council's role in this regard has some parallels with that of the Italian Constitutional Court after World War II. As Mary Volcansek has shown, the Italian Court played a crucial role in redemocratizing Italy by striking fascist legislation that remained on the books (Volcansek 1994, 498, 504). By reclaiming, step by step, space for democracy, the Italian Court allowed gradual institutional adjustment to the new configurations of power, and played a key role in democratization.

In doing so, the Council of Grand Justices has served as a vehicle for the importation of foreign norms into the constitutional system. The mechanism of transmittal has been the pattern, as in other new democracies, of citing foreign case law and international norms of criminal procedure (see also Klug 2000). This has been especially apparent in recent Interpretations concerning the police and military. Several cases have arisen since 1990 where the Council held that longstanding police methods violated criminal procedure rights guaranteed in Article 8 of the Constitution, an article whose very design reflected American influence (Beer 1979, 51-52). These have been particularly controversial decisions because of the rising crime rate in the ROC that has accompanied liberalization. For example, in Interpretation No. 384, the Council struck

five articles of the “Antihooligan Law” of 1985. These articles had allowed police to administratively detain without a judicial warrant any persons designated as “hooligan.” No judicial appeal of one’s “hooligan” status was allowed, and there were special procedures used by police to interrogate and punish such people. These rules were held to violate various provisions of Article 8 even though they were technically administrative rather than criminal in nature. In response, the legislature passed new anti-gang legislation in conformity with the Interpretation, one day before the deadline imposed by the Grand Justices. The new law, however, also came under Council scrutiny because, even though the power to detain alleged hooligans had been transferred to judicial authorities, it allowed two months of investigative detention without adequate guidelines. In 2001, the Council again struck the law and gave the legislature a year to reform it.

Another criminal procedure case relying on Article 8, Interpretation No. 392, concerned the power of prosecutors to authorize detention of civilians without judicial warrants. The prosecutors argued that they had quasi-judicial status and served as a “court” for purposes of the required hearing within twenty-four hours of detention. The Council, however, disagreed, and insisted that a court means a judicial body and does not include prosecutors. This decision led to a complete revision of the Code of Criminal Procedure more in line with Western norms.

In January 1998, a Council Interpretation ended the ban on rallies advocating secessionism or communism as a violation of free speech, saying that “effective immediately, police cannot disapprove applications for public rallies advocating secessionism and communism.” The Council thus demanded that the authorities act in a content-neutral manner when considering censorship, without regard to the particular

viewpoint of a potential speaker. Their language and framing of the issue drew directly on American constitutional law and arguments about the need for content-neutral time, place and manner restrictions. The Interpretation also reveals something about the current Council's substantive views about the advocacy of Taiwan independence. This issue is important because constitutional amendments in 1992 provided for the Grand Justices to hear (sitting as a Constitutional Court) challenges against "unconstitutional" political parties, defined as those whose "goals or activities jeopardize the existence of the ROC or a free democratic constitutional order." These clauses were thinly targeted at the Democratic Progressive Party (DPP), particularly its pro-independence factions that would eliminate the ROC and declare a new state of Taiwan. The transfer of this power to the Grand Justices reflects continuing German influence in Taiwan's constitutional law,¹² and was seen as progressive in that it took the determination of unconstitutional political parties away from an Executive Yuan "Political Party Screening Committee," which had the previous January agreed to punish the DPP for its pro-independence plank.

Labor law has also been an active area for the Council. The KMT's "authoritarian corporatism" had included a quasi-state labor organization, the Chinese Federation of Labor (CFL), which was the only legal island-wide labor union. In 1994, twelve unions from state-owned enterprises sought to leave the CFL and form a new union, and after being rejected by the authorities, went to the Council of Grand Justices. The next year the Council released Interpretation No. 373, allowing teachers to form

¹² Under the German Basic Law, the Constitutional Court also has the power to disband political parties that "seek to impair or abolish the free democratic basis order." Basic Law, Article 21. (Kommers 1997, 13, 223-29)

unions and voiding provisions of the Labor Union Law to the contrary. The Constitution protected the right to form Unions, according to the Grand Justices. German and Japanese constitutional law played an important role in the reasoning of a concurring minority (Cooney 1996, 58).

In all of these cases, the Council has not directly challenged the old paradigm, but has systematically removed many of the barriers to discussing and challenging it. The fact that these decisions mainly came after the appointment of the overwhelmingly Taiwan-born Sixth Council suggests that their goal is not merely a matter of revitalizing the 1947 Constitution adopted on the mainland. Rather, the Council appears to be dismantling the systems of mainlander control and developing a new constitutional scheme through caselaw, by using broad concepts of a constitutional “spirit” and the practice of other modern democratic nations. In a subtle way, the Council is articulating a vision of what the new Taiwan will be about. The expanded role of the Council can be seen in the increasing number of cases presented and decisions rendered by the Council.

Table 1: Council Interpretations by Term

Term	First (1948-57)	Second (58-67)	Third (67-76)	Fourth (76-85)	Fifth (85-94)	Sixth (94-)
No. Petitions to Council	658	355	446	1145	2784	1623
Unified Interpretations	54	35	22	21	18	1*
Constitutional Interpretations	25	8	2	32	149	166*
Total Interpretations Rendered	79	43	24	53	167	167*

* Note: Sixth Council statistics only include 7 years of 9-year term, through 2001.

Sources: The Grand Justices and Constitutional Court of the Republic of China (Taipei: Judicial Yuan, 1995), 40-41; Su Yong-chin, “Summary of Interpretations by Council of Grand Justices” in *Fifty Years of the ROC Constitution (Zhonghua minguo xing hsien wu shi nien)* (Taipei: National Assembly, 1997), 273-280; statistical report available at <http://www.judicial.gov.tw/juds/EG-1.HTM>; supplemented by author

The Table shows that the Council is rendering significantly more interpretations than in the early years. The number of interpretations issued in each of the Fifth and Sixth terms, corresponding to the democratization period, is nearly equal to the total of the previous 36 years combined. Furthermore, the character of the interpretations has changed, from consisting mostly of “unified interpretations” of laws, to the more explicitly political function of constitutional interpretation.¹³ During the First term, the vast majority of petitions submitted for resolution came from government agencies asking the Council to clarify the various responsibilities of government bodies, rather than from private individuals. Many of these government petitions came from the Executive branch itself. They served the interest of the sovereign in internally coherent government, adjudicating

¹³ The Council of Grand Justices has two functions, to unify the interpretation of statutes and regulations and to interpret the Constitution. Only government agencies may request a unified interpretation from the Council while both government agencies and citizens may ask for a constitutional interpretation.

boundary disputes between its components. By the Fifth term, the Council was playing a completely different function: constitutional interpretations dominated its docket, and over 90% of petitions came from individuals.¹⁴ This reflected the very different logic of constraining the state, a reflection of the expansion in public access engineered by the Council itself in a series of key decisions, as well as the growing ability and willingness of the Council to provide relief to citizens who challenge government action, as shown in Table 2.

Table 2: Interpretations Concerning Allegedly Unconstitutional Laws/Actions

	First, Second and Third Terms	Fourth	Fifth	Sixth
Number of Interpretations	4	29	135	167
Findings of Unconstitutionality	1	5	41	65
Percent Unconstitutional	25	17.2	30.6	38.9

Source: Su Yong-chin, *Summary of Interpretations by Council of Grand Justices, in FIFTY YEARS OF THE ROC CONSTITUTION* 276 (Taipei: National Assembly, 1997). Sixth term statistics are through 2001.

The Council's growing independence is also shown by a dramatic rise in the number of concurring and dissenting opinions. During the first two terms, when the Council was acting as an instrument of political authorities, most Interpretations were unanimous. Some dissent was apparent in individual cases, particularly in the Fourth term. But ideological diversity appears to be greatest in the current Sixth term, with a dramatic increase in the number of concurring and dissenting opinions.

Table 3: Diversity in Constitutional Interpretations

Term	First (1948-57)	Second (58-67)	Third (67-76)	Fourth (76-85)	Fifth (85-94)	Sixth (94-)
Constitutional Interpretations	25	8	2	32	149	167*
Dissenting Opinions	0	2	4	25	58	103*
Concurring Opinions	0	0	0	0	10	44*

¹⁴ Of those petitions still submitted by government agencies, the Legislative Yuan had replaced the Executive Yuan as the greater source of petitions.

* Note: Sixth Council statistics only include seven years of nine-year term. An individual Interpretation may generate multiple opinions, so the sum of concurrences and dissents is greater than the total number of Interpretations with such opinions.

I interpret the rise in concurrences and dissents as a sign of the growing *institutionalization* of the Council, as well as an indicator of independence. Where a court is merely expressing the will of another political actor, there is little reason to come up with competing justifications for a majority opinion. Such courts are engaged in a kind of translation of political will into constitutional language, and diversity of opinions undermines the coherence of the sovereign command. But where a court is engaged in genuine deliberation and debate, with the capacity for articulating new principles and positions, the reasons behind a decision become extremely important. It therefore becomes important for individual justices to use their opinions to articulate their constitutional views, both to convince their colleagues of the merits of their position, and to plant the seeds of doctrines that may be developed in future opinions. Where the court is weak as an institution, such opinions make little sense.

Dissenting and concurring opinions also reflect a feature of institutional influence from abroad. In ordinary courts in most countries in the civil law tradition, there are no separate opinions permitted. But one important exception is the Constitutional Court of Germany, whose members regularly issue dissenting and concurring opinions. The adoption of this institution by the Grand Justices illustrates tacit influence from German and American constitutional courts, and a general feature that distinguishes constitutional litigation from other forms.

Finally, it is important to note that standing before the Council has broadened in the democratic period. 1993 amendments to the procedural law of the Council extend

standing to any group of one-third of the members of the Legislative Yuan, who may submit a question to the Council about pending legislation or the constitutional provisions on their duties directly to the Council. This extension of abstract review to pending legislation is likely to result in a great expansion of the Council's political role as pending legislation is brought before the Constitutional Council by minority parties in the legislature. Indeed, a similar dynamic occurred in France following revisions to broaden standing to minority groups in the legislature in 1974 (Stone 1992). But while the French *Conseil Constitutionnel* can only hear challenges to legislation before promulgation, the Council of Grand Justices may also hear challenges to the application of a law. It thus combines some features of the French and German models of constitutional review.¹⁵

After the revision of the Council Law in 1993, Interpretation No. 371 of the Sixth Council in January 1995 greatly expanded citizen access to judicial review. This Interpretation actually struck part of the Council Adjudication Law as unconstitutional, specifically the provisions preventing lower court judges from referring cases to the Council.¹⁶ Article 5 of the Adjudication Law said that the Supreme and Administrative Courts, at the top of their respective judicial hierarchies, may adjourn proceedings and refer constitutional questions to the Grand Justices. The question concerned how lower court judges should deal with laws they consider to be unconstitutional. The provisions

¹⁵ Another procedural revision in 1993 grants the Supreme and Administrative Court the explicit power to set aside ongoing proceedings when confronted with an issue of constitutional interpretation of a statute or regulation. This is similar to the concrete norm control exercised by the German Constitutional Court.

¹⁶ Article 5, Section 3.

contemplated the lower court applying the allegedly unconstitutional law and the Supreme Court considering the issue on appeal, suspending the proceedings at that point to refer the constitutional question to the Council. The Grand Justices extended the adjournment provisions to all lower courts, and voided those provisions incompatible with their Interpretation. Besides empowering lower courts, this interpretation expands citizen access by providing more opportunities for Council rulings earlier in the legal process. The rhetoric of the decision shows the increasing power of the international dimensions of the rule of law, as the Justices invoked the constitutional review systems in Japan, the U.S. and Germany, which they characterized as “modern countries observing the rule of law.” (Cooney 1997, 173). The decision also shows the particular importance of Germany as a reference point for Taiwan law. German Constitutional procedure has a similar device for so-called concrete norm control through lower court certification of questions from ongoing proceedings (Kommers 1997, 14-15).

This Interpretation may prove to be the most important of all interpretations related to structural position of the Council. By providing for immediate and direct certification to the constitutional court, the decision empowers lower courts, relative to the top bodies of their judicial hierarchy. Because Taiwan’s judicial system, like that of Japan, has historically relied heavily on the promotion of judges through a judicial hierarchy as a means of political control, the extension of constitutional reference power to every judge in Taiwan radically decentralizes the source of referrals to the Council, and will likely create a new important source of cases for the Council to hear. The dynamic is similar to that used by the European Court of Justice (ECJ) under Article 177

(now replaced with Article 234) in extending its power.¹⁷ European national courts, including lower courts, could halt proceedings to refer questions of European law to the ECJ. This provided lower courts with a vast and expanding new set of legal norms to apply. This amounted to a new set of ammunition to reach decisions that might otherwise be unavailable to them. Previously, conflicting national law would be enforced on appeal by higher courts. So the provision allowing them to use European law had the dual effect of enhancing lower courts' power relative to that of higher courts at the national level, as well as expanding the normative reach of European law as quasi-constitutional law.

Interpretation No. 371 is also significant because it definitively declares that the Council, not the Legislative Yuan, is the ultimate determiner of its own jurisdiction. This *kompetenz kompetenz* reflects an idea of German origin. Constitutional law scholarship on Taiwan retains heavy German influence, and this is reflected in the composition of the Council: of eight current Grand Justices who have obtained foreign degrees, four have German or Austrian degrees. (The others have American degrees.)

The structure of constitutional review on Taiwan has thus been altered by justices heavily influenced by the German model. One can also see substantive influence in particular decisions that cite foreign constitutional caselaw. Courts in many new democracies have been active in looking abroad for foreign norms to provide substance to constitutional texts, engaging in dialogues with foreign counterparts. This is apparent in many constitutional decisions in Taiwan, as judges are willing to look abroad for help

¹⁷ Treaty on European Union and the Treaty Establishing the European Community, 37 I.L.M. 56, 125-6 (January 1998).

in resolving particular constitutional problems and for giving substance to the rights enumerated in the constitutional text.

The use of foreign materials began with dissenting opinions as justices in the minority sought to justify their disagreement with the majority. But gradually, the use of foreign citation began to creep into majority opinions and concurrences. This pattern shows the logic of dissent: while losing a particular case, a judge who values a particular position can seek to persuade colleagues of his position over the long term. It also suggests two levels of foreign influence: one in the institutional practice of dissent itself, and one in the actual substantive norms adopted in the practice. The following table summarizes the use of foreign citation in constitutional interpretation in three sample years.¹⁸

Table 4: Foreign Citation in Constitutional Cases in Three Sample Years

	# constitutional interpretations	# cases with dissenting opinions	# dissenting opinions including foreign citation	# majority or concurring opinions with foreign citation
1980 (Fourth Council)	6	5	2	
1990 (Fifth Council)	22	9	3	
2000 (Sixth Council)	21	5	2	3

¹⁸ These years were selected randomly to show change over ten-year intervals.

Anecdotally, it appears that 2000 was a year with relatively *little* foreign citation compared with 1998 or 1999. The table nevertheless shows a change in the character of foreign citation, shifting from dissenting to majority or concurring opinions.

Council)				
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An example of how foreign materials are deployed can be found in Interpretation No. 499, issued in March 2000. In this case, the Legislative Yuan challenged constitutional amendments passed by the National Assembly as violating procedural requirements of a public vote. The National Assembly argued that the Council lacked jurisdiction to examine the internal procedures of the Assembly in passing an amendment. The Council again drew on German legal theory to find that the Council—not the Assembly—had the final say in determining its jurisdiction. In a detailed discussion of American constitutional law, the Council rejected the argument that the case involved a political question.¹⁹ It also cited German, Italian and Turkish constitutional cases.

It is interesting that this looking abroad by Taiwan’s Council of Grand Justices has expanded at the same time as the Sixth Council has sought to domesticate, or Taiwanize, the Constitution of the ROC, broadening its normative basis to include comparative law and general principles beyond those written in the text in Nanjing in 1946.²⁰ Indeed, holding up the ROC system to the rhetorical standard of international practice may be the most important contribution the Council has made in a country denied a “normal” national identity. In this case, the international rhetoric of the rule of law highlights the distinction between democratic and constitutional governance on

¹⁹ The Council cited, among other cases, *Coleman v. Miller* 307 US 433 (1939) and *Uhler v. AFL-CIO*, 468 US 1310 (1984).

²⁰ Interview T-2, December 1998.

Taiwan and the one-party state on the Chinese mainland. In this sense, Chiang Ching-kuo's vision has become a reality in a way that he likely did not intend.

Taiwan's Council of Grand Justices has not only looked abroad for particular substantive norms of constitutional democracy, but has also self-consciously invoked foreign models for certain structural features of judicial review. Even when not explicitly adopted, the *practice* of constitutional review on Taiwan increasingly resembles that in other constitutional democracies. The expansion of judges issuing dissenting and concurring opinions is itself an example. The extension to local courts of the power to refer constitutional questions is another. In a very real sense, the structure and institutional forms of public law as well as its normative content are subject to transfer across borders.

III. JUDICIAL REVIEW IN KOREA

Since independence in 1945, Korea has had six republics, each of which included some provision for constitutional review.²¹ However, until the mid-1980s Korea was ruled almost continually by a series of military authoritarian governments. Early attempts by judges to exercise the power of judicial review provoked political backlash. In 1970, the Supreme Court upheld a lower court decision that prevented the government from withholding compensation to military personnel who sustained injuries on duty. This was controversial because, as a militarized state, compensation to active servicemen for injuries sustained in training or war could impose a severe cost on the state budget. The executive branch feared the financial consequences, as well as the ideology of rights against the state that the decision reflected. At the same time, the Court struck an amendment that had attempted to raise the voting threshold for the Supreme Court to declare a law unconstitutional, an effort by the government to assure a favorable outcome in the government compensation case.

²¹ The First Republic (1948-1960) bifurcated constitutional review between a Supreme Court, with the power to adjudicate the constitutionality of administrative regulations, and a Constitutional Committee. The latter was composed of the Vice-President of the country, five Supreme Court justices, and five legislators, and was therefore as much a political organ as a legal one. This form of centralized review was adopted after extensive consideration of the American decentralized model. Ultimately, the U.S. model was rejected because of the distrust of ordinary judges who had served the Japanese colonial regime.

President Park Chung-hee was furious at this decision and the audacity shown by the Court in resisting political interference. He then initiated the *Yushin* Constitution in 1972, which concentrated power in the Presidency, and subsequently excluded every judge who had voted to strike down Article 2(1) of the Government Compensation Law. The Constitution was also amended to incorporate the provision denying compensation to military personnel who sustain injuries in active duty. In this way, by inserting the *status quo ante* into the text of the Constitution itself, Park over-ruled the Court. Judicial review was dormant for the next decade and a half of military rule.

In 1987, following massive street demonstrations, the government announced it would hold direct elections for the presidency and take steps to initiate democracy. One of the most important constitutional amendments adopted in 1987 concerned the re-establishment of a constitutional court. The Court is composed of nine Justices, who are appointed by the President upon nomination by various institutions. Three are nominated by the National Assembly, three are nominated by the Chief Justice, and three may be appointed by the President himself. The judges serve renewable six-year terms.

Modeled closely on the Federal Constitutional Court in Germany, the constitutional adjudication system of the Sixth Republic marked a break with the past. However, few observers expected the Court to have the impact that it has had (Ahn 1998, 71; West and Yoon 1992, 79). The Court has served notice that it intends to take its role as guardian of the Constitution seriously. Indeed, in its very first case, it struck as a violation of the equality principle of the Constitution an Article of the Special Act on Expedited Litigation that held that the State could not be subject to preliminary attachment orders. The Court insisted that the equality under the law requires treating the

state no differently than a private citizen or corporation. In doing so it went directly to the philosophical underpinnings of the *dirigisme* that had been at the heart of the postwar Korean political economy. In many other areas, as well, the Court has had a dramatic impact.

As with the German system, there are various different categories of decision that the Court can render. First, it can hold an act unconstitutional (*Verfassungswidrig*), voiding the act immediately. It can find the act to be nonconforming with the Constitution (*Unvereinbar*), in which case the National Assembly may be required to amend the act in the near future; it can find a part of the act unconstitutional, in which case the offending provisions are severed and voided; it can find the Act constitutional but applied in an unconstitutional way (“unconstitutional limitedly”); and can find the act is conformable limitedly (*Beschränkte Verfassungskonforme Auslegung*), that is, constitutional as long as it is interpreted in a certain way, as in the instant case. Finally, of course, the Court may uphold the act as constitutional (*Vereinbar*).

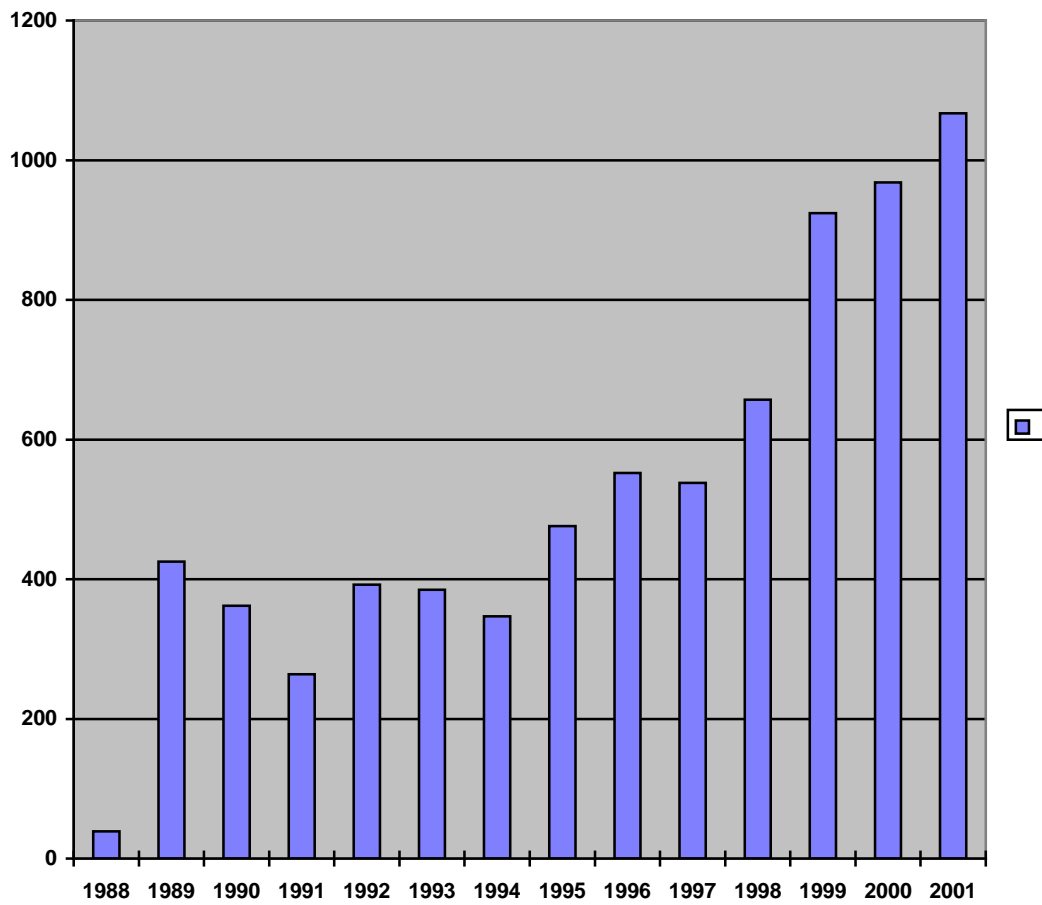
These various gradations of declarations of constitutionality and unconstitutionality place the Court in dialogue with the legislative branches and executive agencies. The Court need not openly challenge legislative authority, but rather can send a signal to the legislatures demanding or suggesting revision. It can also provide guidance for enforcement agencies as to how to apply the law to avoid constitutional defect. These intermediate findings, falling short of a complete voiding of the law or action in question, force the political authorities to reconsider their initial decisions in light of constitutional interpretation. While they do not guarantee compliance, they throw the ball back into the court of the politicians. The attractions of these mechanisms are

amply illustrated in the Korean case, as the Constitutional Court has recently become more inclined to use the nonconformable finding than to declare a law unconstitutional.²² It should be noted that the legislature has in every case responded to a finding of nonconformability with an amendment to legislation.

The Court has been quite active in its first ten years of operations, becoming involved in numerous politically sensitive cases, and frequently striking legislation. In its first full year of operations in 1989, it found legislation and government action wholly or partially unconstitutional in 76% of the cases in which it rendered a decision on the merits. The next year, the figure rose to 85%. To be sure, the vast majority of cases filed were rejected, settled or dismissed; nevertheless, the threat of the Court striking action was sufficiently serious that government became increasingly irritated. As might be expected, political forces sought to punish the court by limiting jurisdiction, most prominently in 1992 with a proposal to restrict its jurisdiction to cases of interbranch disputes, but this proposal by the ruling party was withdrawn due to strong public pressure (Ahn 1998, 76; Yang 1993, 8). Filings to the Court have been high, and generally increasing, over the course of its operations, as shown in the following figure.

²² In the first three years of the Second Term of the Court, the Court found a law nonconformable fifteen times, whereas it had only done so on a single occasion during the entire First Term of the Court. During the same period of the Second Term, the Court declared a law unconstitutional fourteen times. The Court appears more willing to warn the legislature as to nonconstitutionality than to void an unconstitutional act itself.

Figure 1: Korean Constitutional Court Filings By Year



Note: 2001 number is an estimate based on nine-month statistics.

Table 4: Korea Constitutional Court Case Statistics as of Sept. 2001.

	Constitu- tionality of Law	Competence Dispute	Art. 68(1) Const. Complaints	Art. 68(2) Const. Complaints	Constitutional Complaints subtotal	Total
Total cases filed	414	15	5787	915	6702	7131
Dismissed by small bench			2387	72	2459	2459
Withdrawn	98	2	179	27	206	306
Full Bench Decisions:						
Ruled unconstitutional	68		23	125	148	216
Nonconformable	24		6	32	38	62
Limitedly	8		6	18	24	32
Unconstitutional Limitedly	7			20	20	27
Constitutional						
Constitutional	164		3	435	438	602
Revoked (admin. action)		2	139		139	141
Rejected		3	2040		2040	2043
Dismissed	18	5	665	79	744	767
Miscellaneous			2	1	3	3
Total decisions on merits	271	5	2217	630	2847	3126
# Partial/fully struck	91	2	174	160	293	451
% Partial/fully struck	37	40	8	31	12	14

Source: Extracted from Constitutional Court statistics. In keeping with Korean convention, merits cases include rejections but not dismissals. Partially/fully struck includes all decisions but “constitutional” and “rejected”.

The Court has struck, in full or in part, 37% of laws whose constitutionality has been challenged. Because of the large number of administrative actions challenged, the overall rate of findings of unconstitutionality is lower. Nevertheless, these statistics are

comparable to those exercised by contemporary courts in the U.S., Germany and elsewhere.

One sign of the Court's boldness has been its willingness to create new rights by reading the text of the constitutional document quite broadly. For example, in 1991, the Constitutional Court read Article 10, which grants citizens a right to pursue happiness, to include a right to freedom of contract (Ahn 1998, 89). The case involved a legislative requirement that certain building owners carry insurance, and the Court struck the provision as interfering with the freedom of contract. Another such instance came in 1989 when the Court found an implied "right to know" based on several clauses of the Constitution, echoing Japanese constitutional caselaw. It subsequently strengthened that provision by referring to the Universal Declaration of Human Rights.

The "right to know" has potentially much broader implications for administrative action and for state-society relations. The Court's finding that "it is indisputable that public information must be released to those with a direct interest in it"²³ is quite radical in the context of the Northeast Asian developmental state. For the first time, citizens can make affirmative demands for information from the Korean state, and need not rely on the "benevolent paternalism" of the past.

The Court has also used a provision in the Constitution providing for due process of law in criminal procedure quite broadly, and has said that "due process is a unique constitutional principle, not limited to the criminal procedure ... the principle requires that not only the procedures be described by the law, but the law be reasonable and

²³ Ho 1995, 14, *quoting* Judgment of September 4, 1989, 88 HonMa 22.

legitimate in its content.”²⁴ From an American perspective, these decisions evoke *Lochner v. New York*, which used a notion of substantive due process to find a constitutional guarantee of freedom of contract.²⁵ Unlike the *Lochner* Court’s judicial activism, which reacted to the first inklings of the modern regulatory state, the Korean Court’s activism comes in the face of a statist economic policy that is entrenched and pervasive. Arguably, it is more radical for a Court to find a freedom of contract in the *dirigiste* Korean context than in the turn-of-the-century United States where *laissez faire* economic doctrine prevailed.

The Court in 1995 found several provisions of the electoral law to be nonconforming because of excessively disproportional representation for rural districts compared with urban ones. As in Japan, Korean districting has been designed to maximize the influence of conservative farmers at the expense of more diverse city-dwellers. Relying in part on Japanese, German and American cases, the Court set an explicit limit of 1:4 disproportionality between urban and rural districts.²⁶ In an instructive contrast with similar cases before the Japanese Supreme Court, the National Assembly amended the election law to conform with the Court’s decision. (cf. Bailey 1997).

The Court has also been heavily involved in sensitive political issues, including those concerning retroactive justice for the bloody Kwangju incident of May 1980, where

²⁴ April 28, 1993, 93 HonBa 26, 6-1, KCCR 355-56. Translation by Ahn, 1998, 109.

²⁵ 198 U.S. 45 (1905).

²⁶ 1995, Cases Nos. 224, 239, 285, 373

military personnel slaughtered hundreds of nonviolent protesters.²⁷ Many believe that President Kim Young-sam, who became the first civilian to assume the Presidency in 1992, had agreed not to pursue claims against his predecessors, the Generals Roh Tae-woo and Chun Doo-hwan, as part of the deal that allowed Kim to take power and democratization to proceed (West 1997). Early in his term, prosecutors had investigated the two generals and dropped all charges related to treason during the 1979 coup or the deaths in the 1980 incident at Kwangju. Later, however, responding to public pressure and seeking to deflect allegations of corruption, Kim changed his mind. The Constitutional Court was asked to rule whether special legislation to facilitate prosecution even after the normal period of statutory limitations had expired, passed at Kim's instigation, was constitutional. In a carefully worded decision that invoked foreign court decisions and an international treaty, the court found that the legislation had been passed after the expiry of the period of statutory limitations for the 1979 coup, but that prosecutions for the Kwangju incident could proceed. The Court's analysis highlighted Kim Young-sam's failure to take action against the Chun and Roh early in his Presidency when the statute of limitations would not have been an issue. Ultimately, both men were found guilty. Chun was sentenced to death and Roh to twenty-two years in prison. Both sentences were reduced by a lower court, and the men were subsequently pardoned through the initiative of President-elect Kim Dae-jung in December 1997.

²⁷ The precise facts of the incident are hotly disputed, including the number of dead, estimates of which range between the official figure of 191 up to 2000. *See generally* Clark 1988.

The Court has been especially important in dealing with the legacies of the authoritarian regime, particularly the National Security Act (NSA) and the Anti-Communist Act. These laws were used to suppress independent political organizations by providing draconian sanctions against dissenters and loosely-defined illegal associations. The laws were therefore a target of human rights activists and regime opponents. The statutes operated by carving out exceptions to normal requirements of criminal procedure. For example, Article 19 of the NSA allowed longer pre-trial detention for those accused of particular crimes, and this was struck by the Constitutional Court in 1992.²⁸ The provisions in question extended pre-trial detention for up to fifty days, an exception from the normal period of 48 hours allowed under the Code of Criminal Procedure (Cho 1997). The Court held that the extended period constituted an excessive limitation on basic rights to a speedy trial.

Even more important was the Court's limitation of offenses defined under the Act. Article 7(1) of the NSA penalized any person who "praises, encourages, or sympathizes with the activities of an anti-state organization or its members, or any person who receives orders therefrom; and any person who by any means whatever benefits an anti-state organization." This provision was held to be overly vague and overbroad, and to threaten constitutional guarantees of freedom of the press and speech,²⁹ freedom of academic study,³⁰ and freedom of conscience.³¹ Noting the continuing confrontation with

²⁸ Decision of April 14, 1992, 90 HonMa 82, 4 KCCR 194.

²⁹ Article 21(1).

³⁰ Article 22(1).

³¹ Article 19; Decision of April 2, 1990, 89 HomKa 3.

North Korea, the Court did not actually strike the law, but suggested the provisions only be applied in the case of danger of actual security risks. It restricted interpretations of the law and asked courts to balance the proximity of danger with the constitutional position of freedom of expression. In particular it held that it could only be used to punish activities with a substantive danger, so merely “encouraging” or “sympathizing” without such a showing could not be prosecuted.

However, a dissenting opinion called for the Court to require a higher standard of “clear and present danger” before a prosecution could be upheld in an NSA case. In characterizing the majority test as one of “bad tendency,” Justice Byon Chong-soo self-consciously modeled his decision on the opinion of U.S. Supreme Court Justice Holmes in *Schenk v U.S.*.³² Byon’s use of Holmes’ phrasing subsequently influenced a Supreme Court NSA case, on May 31, 1992, where the minority argued that the threat must be a “concrete and possible danger” for prosecution, under Korea’s “liberal democratic basic order.”³³ (Cho 1997, 169). The next year the National Assembly amended the law so as to apply only where the person charge had actual knowledge that his actions might endanger the existence or security of the state or the “fundamental order of liberal democracy.” Again, a Court decision led the legislature to substantially narrow its definition of an offense, introducing the element of specific knowledge to limit the application the National Security Act, the single most egregious law associated with military rule.

³² 249 U.S. 47 (1919).

³³ Other such invocations in the decision includes a reference to the “competition of ideas” and invocation of German doctrine. (Cho 1997, 171).

Perhaps the greatest political controversy the Court has had to deal with was the constitutional crisis following the election of Kim Dae-jung in 1997. This first handover of power to an opposition figure was a moment of triumph for Korean democracy, but was also accompanied by the conflict that has plagued Korean political culture. Because his support was especially drawn from the Southwest part of the country, Kim had formed an unlikely electoral alliance with Kim Jong-pil, the conservative founder of the Korean Central Intelligence Agency. The bargain was that Kim Jong-pil would deliver support from his region and thus provide Dae-jung with a plurality; in return Kim Dae-jung promised Jong-pil the post of Prime Minister. However, the opposition Grand National Party had control of the National Assembly, so Kim Dae-jung was unable to assure Kim Jong-pil's approval as Prime Minister as required by the Constitution.

To avoid a parliamentary vote he was sure to lose, Kim Dae-jung appointed Jong-pil "acting" Prime Minister. Members of the Grand National Party brought suit in the Constitutional Court to declare the "acting" appointment unconstitutional and enjoin it.³⁴ This put the Court in a difficult position. It had not developed a doctrine of nonjusticiable political questions; nor was there any question that a real interest had been presented. The Constitutional Court dismissed the case on standing grounds, saying that only the Assembly as a whole, not individual lawmakers, had the right to bring a case to

³⁴ They first took the unusual step of suing the Speaker of Parliament, himself a senior member of the Grand National Party, for failure to complete the vote. Some interpreted this suit as a tactic to frame the more important issue of whether the appointment as acting prime minister was acceptable.

the Court. In mid-August, Kim Jong-pil was finally confirmed after a compromise gave six of thirteen committee chairmanships to the Grand National Party.

As in Taiwan, the Court has made frequent use of foreign citation in both majority and dissenting opinions. Also as in Taiwan, dissenting opinions have been the primary vehicle. In the first term of the court, the sole member of the court appointed by the opposition party was a frequent dissenter and fond of drawing on foreign materials to justify his position (Ahn 1998). As the political basis of the court was broadened in the second term, the use of foreign materials in constitutional deliberation has become more common.³⁵

In some cases both the main and minority opinions will spend time on foreign legal terrain. For example, when the Court relied on German and British practice to support its finding that Article 21 of the Urban Planning Act was not in conformity with the Constitution,³⁶ a blistering dissent argued that the Court had misunderstood German practice and improperly analogized from it to the distinct Korean constitutional scheme.³⁷ The Justice argued that the Court's practice of issuing "nonconformable" decisions, by then a well-established practice in Korea, was improper, that the Court had "irresponsibly adopted German precedents without serious study, analysis, and evaluation," and that the ruling should have been one of unconstitutionality. In doing so, the Justice himself discussed German practice and constitutional history in some detail. This demonstrates

³⁵ Interview K-1, Dec. 1999.

³⁶ 10-2 KCCR 927, 89 Hun-Ma 214, 90 Hun-Ba 16, 97 Hun-Ba 78 (consolidated), December 24, 1998.

³⁷ Dissenting opinion of Cho Seung-hyung.

that debates over the adoption of the institutional form of constitutional review are conducted on the terrain of both foreign and local constitutional practice.

These few examples from the jurisprudence of the Korean Constitutional Court illustrate that it is deciding an increasing number of cases, and is clearly a forum for groups seeking to advance social change as well as important disputes of high politics. The Court frequently strikes legislative action and also regularly overturns prosecutorial decisions, particularly important given the central role of prosecutors in the authoritarian period. At the same time, the Court has tread on careful ground in those cases likely to lead to political backlash, as in the Kim Jong-pil case and in its handling of the National Security Act. Undoubtedly the Court is playing a major role in Korean society, and is regularly citing foreign and international norms in doing so.

It is interesting that when there is a particular set of Confucian norms at issue, the Court has often taken a liberal approach. In July 1997, the Court struck an Article in the Civil Code that prohibited intermarriage of Koreans with the same family name and regional origin.³⁸ This provision reflected a law originally written in 1308, when clan-based social structure prevailed.³⁹ This provision had the affect of denying thousands of

³⁸ Article 809, Section 1.

³⁹ Its enactment corresponded with the founding of the Yi dynasty. In my view, the probable rationale behind the law was the need for a centralizing state to undercut traditional clan-based restrictions on marrying outside the group. By encouraging intermarriage among clans, the law broke down the chief source of resistance to central authority.

persons the full freedom of marriage (Ahn 1998, 106).⁴⁰ The decision had immediate effects on an estimated 60,000 couples who lived together but whose clan names had prevented them from legally marrying. The decision was welcomed by women's groups, but opposed by Confucian traditionalists, who staged a protest outside the halls of the Court building, reflecting the judicialization of politics.

Another interesting case concerned the legal regulation of adultery. Reflecting Confucian values, adultery was punishable by up to two years imprisonment under Article 241 of the Criminal Code. This law was challenged as a violation of the constitutional right to pursue happiness, but an odd alliance of traditionalists, women's groups, and the bar association supported the law. The Court refused to strike the law, but the Ministry of Justice, responding to dissenting opinions in the Court decision, announced that it would initiate amending legislation to strike the controversial provisions. However, it ultimately failed to do so in the wake of protests by social activists.

This decision illustrates the myriad ways a constitutional decision can shape social change: although the Court appears to speak for traditional values, it also reflects active interest group politics. The interest of advocacy groups in the constitutional litigation process shows that the Court is an increasingly important political arena;

⁴⁰ Technically, the Court merely found the law to be nonconforming with the Constitution, requiring amendment by the National Assembly. However, the Assembly has not yet amended the law, allegedly because of intense lobbying by Confucian traditionalists. Despite this, the Supreme Court routinely accepts petitions for marriages from persons of the same family name and origin.

furthermore, the role of these groups reflects the strengthening of civil society vis-à-vis the formerly dominant state apparatus. Law and society are now playing symbiotic roles at the expense of state power.

IV. ANALYSIS

A. Factors in Active Judicial Review

Some insight into the factors leading to active judicial review can be gained by briefly comparing our two cases. In terms of background conditions, both Korea and Taiwan present apparently inhospitable environments for the exercise of judicial power. The legal tradition in both countries was highly state-oriented, norms of professional autonomy were not highly developed and earlier attempts to exercise judicial review during the authoritarian period had not been effective at constraining state power. Whatever Confucian influence existed in both societies acted as a further constraint, and helped support the notion that law was an instrument of state power rather than a constraining factor.

Nevertheless, constitutional courts in the two countries have been active and successful at constraining the state. Their decisions have been met with nearly universal compliance. Politicians' attempts at restricting the role of the Court have been deflected by a buffer of supportive public opinion. Both courts have served as an instrument of democratizing the dominant regime, striking vestiges of authoritarianism and expanding the space for public discourse. Arguably, the Korean Court has been more active, but this may also reflect its role as the embodiment of a new constitutional regime rather than a vestige of the old system seeking a new role in an era of democratization, as one might characterize the Council of Grand Justices in Taiwan. Thus the pace and nature of the

transition may make a difference, with a court emerging from a clear constitutional moment having greater legitimacy than one in a more gradual process of democratization. But the Council of Grand Justices has also seen its role increase as it underwent “Taiwanization.”

To be sure, both courts have exhibited caution at times. Both have avoided some sticky political questions, including the issue of the non-nomination of “acting” prime ministerial candidates in both countries. Neither court has completely satisfied activists and scholars who would like to see it move more quickly. For example, many would have liked to see the Korean Court move quickly to scrap the National Security Act (Cho 1997). Instead, the Court has used its finding of limited constitutionality to limit the administration of the Act, and to steer it in directions more consistent with contemporary notions of human rights in a democratic society.

On balance, however, the Courts have been extremely active given their context. Where core interests of the regime are at stake, the Courts have actually challenged political power, a revolutionary development for the judiciary in Northeast Asia. They have anticipated in the subjugation of both state and military to civilian political control, transforming the character of state-society relations. At the same time, they have issued decisions that might provoke counter-attack by prominent political forces. The courts have thus contributed to the consolidation of democracy, in the sense that the process has become fundamentally irreversible barring external shock.

The changing structure of broader legal system has also played a role. Both courts have benefited from an expanding legal profession, particularly organizations that seek to advance social causes through litigation. These groups include women’s groups

in both countries and broader-based Korean NGOs that have actively sought to use litigation as a strategy for social change (Winn 1995; Ahn 1998). NGOs are now important players on the Korean political scene, led by high-profile groups such as the Citizens' Coalition for Economic Justice and People's Solidarity for Participatory Democracy. Institutional diffusion affects not only courts but political activists as well.

Both courts have helped to expand public access through liberal readings on issues of justiciability and standing, and by seeking to include Supreme Court judgments within the jurisdiction of constitutional review. The Korean Court has also allowed petitions against statutes even where no actual harm has occurred because the statute has not yet been applied, and the Council of Grand Justices on Taiwan has been given explicit power of abstract pre-promulgation review. In this way, both courts are in a position to play an even more central role in their political systems.

Divided government in the presidential systems of Korea and Taiwan may have positive effects on the expansion of judicial power, as disputes between executive and legislature become more common. Losing parties can challenge decisions in Court, and thereby force a more deliberative, slower, less aggressive form of politics. Constitutional review therefore has great potential to transform the nature of Korean and Taiwanese politics away from personalism and conflict toward institutionalized deliberation.

B. Influence from Abroad

Both courts have been explicit about looking abroad for normative inspiration. Frequently citing American, German, and international caselaw, these courts are part of a broader trend in many countries to look to global sources in interpreting the domestic

constitution. From South African to Hungary to Mongolia, constitutional courts in new democracies have done the same. In a sense, this is natural in constitutional transformations. At the moment of constitutional transition, democracy and human rights are purely aspirational. They are located “over there” in the advanced industrial democracies. In transforming the local system toward these goals, it makes sense for courts to look outside to provide normative content to constitutional rights. Courts have certain advantages in this regard, being used to identifying norms to be applied in particular cases. Furthermore, legislatures in new democracies are typically underdeveloped and unable to carry out what might otherwise be their natural function of norm-replacement. One would thus expect courts in democratic transitions to play a special role of looking abroad to transform their constitutional orders.

Besides serving as the vehicle for international and comparative norms to enter the domestic system, the courts reflect an *institutional* diffusion. The structure of both courts, after all, is adapted from the Kelsenian model of a designated constitutional court, of which the paradigm case is now the German Constitutional Court. The rules of access and standing to the East Asian constitutional courts have changed in recent years to allow lower court references and pre-promulgation abstract review. These mechanisms were adopted, no doubt, because of their successful operation in other contexts.

What explains the receptivity to foreign norms and models in these two Northeast Asian countries? Geopolitics plays an important role. Both Taiwan and Korea were particularly open to American and German influence for a number of reasons. Both polities were small and vulnerable, characteristics that can lead to quick adjustments to changing international conditions (Katzenstein 1985). Both countries (along with

postwar West Germany) found themselves as United States allies engaged in political-ideological confrontation with communist regimes that claimed to be the legitimate government of their peoples. Their legitimation in these confrontations came from identification as embodiments of liberal values against communism. As such, throughout the cold war period, the United States provided an important “reference society” against which progress was measured. America, and to a lesser extent Germany, was where elites went for training, where dissidents went for exile, and was the source of technology, capital and ideas.

This influence was particularly pronounced in law. Many of the Grand Justices and Constitutional Court justices, as well as the elite legal communities of which they were a part, had undergone training in the United States and Germany. As such they cannot help have been exposed to the important role of the Supreme and Constitutional Courts in those societies, and the legitimacy the courts enjoyed. When the opportunity to exercise more power came with the beginning of liberalization in Northeast Asia, the models for institutional innovation were close at hand.

This does not mean that institutions were copied wholesale. Institutional adaptation always involves transformation through local political processes. In the case of Taiwan, this was particularly pronounced because of the gradual nature of the transition, the continuous need for adjustment and compromise, and the legacy of the Sun Yat-sen constitution. In the case of Korea, the Constitutional Court’s institutional structure has remained constant since 1987, though rapid political change has forced continuous adjustment with the political environment. Nevertheless, constitutional

judges seem to have adapted the forms of constitutional adjudication as well the substantive norms.

C. A Distinctive Style of Constitutional Review? Constitutional Law as Remonstrance

The account offered so far of the emergence of constitutional review in Korea and Taiwan has relied on institutional diffusion from the West, as absorbed by local judicial decisionmakers. Courts were set up along Western constitutional lines, although with some distinctive local features. Once set up, and once free of authoritarian constraints, constitutional justices modified their own institutional structure toward the most successful international models, mainly the Constitutional Court of Germany. They also self-consciously evoked foreign constitutional decisions to buttress their substantive efforts to bring local political behavior in line with international norms of democratic practice.

It may not be completely accurate to paint a picture of a one-way transfer of institutions from Western democracies to East Asian autocracies. In this section, I speculate on the possibility that judicial review has been in some sense localized or domesticated by its interaction with local political culture and conditions. As David Vogel (1986) has observed in the context of regulation, national polities exhibit different regulatory styles (see also Kagan 1991; Kagan and Axelrad 2000). Observers of the United States Supreme Court frequently talk about how changes in Court composition change the character of the Court and its jurisprudence. I want to suggest that there may be a distinctive style of judicial review that accrues to countries in the Confucian tradition

with presidential systems. Thus, notwithstanding increasing convergence of institutional forms and substantive norms, local variations may remain important in terms of the operation of institutions.

In East Asia one might call this style Confucian Constitutionalism. What it involves is great sensitivity on the part of the court to the preferences of the highest political authority. In Korea and Taiwan, as presidential regimes, the President is sometimes characterized in political commentary as the modern-day equivalent of the emperor. Indeed, local observers contend that the succession of Korean presidents, including Nobel Peace Prize winner Kim Dae Jung, who have held office in the democratic era have acted in imperial fashion consistent with the “old” authoritarian style as well as traditional role of the emperor in Confucianism. President Lee Teng-hui in Taiwan explicitly invoked the Chinese imperial tradition several times during his reign.

Just as the emperor in imperial China coexisted with an elaborate system of appeals that checked lower political authorities, so the modern day constitutional courts have been quite eager to challenge lower authorities that have violated principles of legality and constitutionality. The courts have been more reluctant to directly challenge the interests of the emperors themselves. When confronted with questions involving the personal authority of the president, they play a role similar to magistrates remonstrating the emperor, sometimes suggesting or advising but not demanding action.

Constitutional law as remonstrance has been apparent in the most political cases that have confronted the courts to date. For example, when Kim Young Sam sought to go back on his bargain and proceed with the prosecutions of former Presidents Roh Tae-woo and Chun Dae-Hwan, the Korean Constitutional Court came up with a formula that

allowed the prosecution to go forward but made it clear to the President that he was acting with questionable legality. In other cases, the Korean Court's ability to "remonstrate" is facilitated by the adoption of the German institution of levels of unconstitutionality. The Court can easily engage in dialogues with the legislature that facilitate a back and forth process to determine what constitutionality entails (Fisher 1988; Kenney 1999).

A similar occurrence in Taiwan concerned President Lee Teng-hui's failure to re-nominate his designated successor Lien Chan as premier, after Presidential elections. Lien had served as premier and had just won the vice-presidency. A norm had called for the resignation of the cabinet after a new presidential election, but cabinet members had to be approved by the legislature, and Lee (who had promised that Lien would resign the premiership) was faced with an uphill confirmation battle. He asked Lien not to resign and to serve as both Vice-President and acting premier after the election. All the political parties challenged this move as unconstitutional. The Grand Justices ruled on the merits in an unusually long and ambiguous decision. There was nothing in the Constitution, they held, preventing the Vice-President from serving as premier. Nevertheless, the majority held that the simultaneous appointment was not in complete conformity with the *intent* of the constitutional document. The Constitution clearly implies that the President and Premier cannot be the same person, since the former appoints the latter and the latter can in certain circumstances act for the former.⁴¹ The Vice-President can succeed to the Presidency, and in that event the simultaneous appointment of the Vice-President as

⁴¹ Constitution of the Republic of China, Article 55 (appointment) and Article 51 (Premier's temporary acting for President).

Premier would become unconstitutional. Thus, said the Council, it would not be advisable for Lee Teng-hui to retain Lien Chan as both Vice-President and Premier. This form of deciding was seen to be a soft way of remonstrating the President, while allowing him to claim victory on the substantive point.

More broadly, the Council seemed reluctant to issue a direct challenge to presidential rule during Lee Teng-hui's regime. The most significant decision during this period, Interpretation 261 that called on the "old thieves" to retire, was in fact quite consistent with the political desires of the "new emperor" Lee. Together, the Council and Lee's reform faction worked against the old vision of the KMT by promoting, in many areas, the revitalization of political life on Taiwan. Unlike the series of cases where the Council worked to expand its freedom of maneuver, it is difficult to untangle the Council's substantive preferences from those of the political forces it supported, and possible to characterize constitutional review as pro-President. In interviews conducted in 1998, Justices explained how they viewed Lee's project of Taiwanization as of paramount importance. One justice stated that Lee was his President, and he supported him in whatever way he could.⁴²

Of course, this type of sensitivity to political context and careful framing of decisions are not unique to the constitutional courts of Northeast Asia. All successful constitutional courts must be sensitive to their political environments, and the experience of other courts in Asia makes this all too evident (Teik 1999). All constitutional courts must frame their adverse decisions in a way that is most palatable to those in the best position to hurt them. And all constitutional courts are engaged in dialogues with the

⁴² Interview T-3, Dec. 1998.

legislature. Perhaps these features are merely the hallmarks of politically successful courts, and their presence in East Asia evidence of astute and strategic justices. Nevertheless, the propensity of constitutional courts toward “warning” rather than “striking” is consistent with the notion of judicial review as remonstrance.

My argument is that judicial review can be described in traditional terms, despite conventional views of incompatibility with the Confucian legal tradition (see also Jones 1994). In this sense, the adaptation of a foreign institution may be consistent with certain elements of local political tradition that may not have been anticipated *ex ante*. It may be useful to speculate briefly on the construction of a Confucian philosophy of judicial review of legislation. In Confucian tradition, *li* represent the most important rules to which humans are subject, and can be described as a kind of higher natural law, constraining human positive law. Any ordinary laws that are promulgated in conflict with the *li* must therefore be interpreted in such a way as to make them compatible, or rendered void. For example, if an imperial ruler promulgated a law requiring sons to inform on their fathers who violate positive law, this would be in conflict with the cosmic order of human relationships as embodied in the *li*. Where ordinary law conflicts with cosmic rules, who should decide which is to be obeyed?

The imperial Chinese legal system (with its fusion of legal and political authority in a single individual) did not contemplate that the emperor or lawmaker would need external constraint in trying to resolve such problems. One reason there was no need for *ex post* constraints on lawmaking is that there were substantial pre-promulgation constraints in the structure of the imperial bureaucracy itself (Shaw 1981b, 28-29). Each dynasty enacted codes of law to govern, but the emperors themselves did not draft these

codes. Rather they were developed by advisors and law drafters in the bureaucracy. These people were not free to enact any rule they desired but rather had to give expression to their understanding of universal order and proper policy. This understanding was collective, and part of their shared training as imperial magistrates. No doubt substantial constraints on lawmaking developed within the discursive communities themselves. No law would ever be passed in violation of the *li* because the drafters, themselves specially trained in the *li*, would quash any proposal to do so. As long as the system lasted, tradition itself constrained the exercise of lawmaking power.

Once we move to a system of positive legislation developed by a democratic assembly, the Confucian approach to judicial review reverses. No longer is the law the expression of universal and shared traditional norms, but an expression of particular policy goals identified by temporal individuals in the legislature. Now positive law itself becomes a threat to the *li*. Although ideally the people's representatives are righteous and upright, there are a number of reasons to be suspicious of them relative to their predecessors in the imperial Confucian bureaucracy. Modern legislators have varied social backgrounds, are not selected on merit, and may have visions of a democratic society that are quite disparate. They are constrained by politics but not by tradition, and hence pose a threat to the *li*.

How then can a political system ensure that the *li* are not violated by positive legislation? One answer would be to establish a supreme Confucian council of wise men who served only as authoritative interpreters of the *li* with the power to strike legislation incompatible therewith. This vision of judicial review of legislation is rooted more

heavily in natural law than many contemporary models, but nevertheless provides a viable justification for the institution in a Confucian context.

This Confucian model of judicial review is also consistent with the long Chinese traditions of rationalism and rule by the learned. In imperial China the government was composed of scholar-officials who ruled because of their mastery of ancient texts, so there is a long tradition of an elite whose key job qualifications are wisdom and learning. By providing for a constraint on democratic assemblies by a small group of elite experts in interpretation, judicial review of legislation actually serves the traditional function of control by the learned.

The main point is that culture is flexible and dynamic, and can provide rationales for a wide range of political institutions. The Confucian legacy as conventionally interpreted poses barriers to the emergence of constitutionalism and judicial review of legislation in Chinese society. But cultural traditions are complex and broad, and subject to multiple and shifting interpretations. Confucian democracy is not the nonsequitur it is sometimes described to be. Neither, in my view, are the contradictions of Confucian constitutionalism insurmountable. Confucianism is a highly elitist philosophy. Virtuous men are to be followed, not because of the manner in which they were selected but because of their inherent qualities and their learning which renders them the best people to uphold social values. An activist system of judicial review may allow judges to assume this kind of leadership role as elite guardians of fundamental values.

I am not arguing that constitutional justices in Korea or Taiwan were themselves Confucians or that their decisions upheld the substantive values of Confucianism (but see Ma 1998). Some of the substantive values of Confucianism, including hierarchy and

patriarchy, are not compatible with the values of liberal democracy. Although other values may be shared (de Bary 1998; Tu 1995; Bauer and Bell 1999; Davis 1998b; Fukuyama 2001) many decisions of these new constitutional courts were in fact opposed by Confucian interest groups, especially in the Korean context. So the substance of constitutional review has been, broadly speaking, anti-Confucian.

The structure of the institution, on the other hand, may not be anti-Confucian at all. My argument parallels Max Weber's assessment of the prospects for capitalism in China (Weber 1951; see also Davis 1998a; Fukuyama 2001; Hamilton and Kao 1986). Although China had high levels of scientific knowledge, a rationalist tradition, and extensive commercial activity, capitalism never developed in China. Weber attributed this to the conservative orientation of Chinese social institutions, for Confucianism reinforced hierarchy rather than the development of autonomous individuals. Although in Weber's view China would not develop capitalism, he argued that China would assimilate capitalism quickly once it became available. Similarly, although judicial review of legislation did not and could not develop within the Confucian tradition, there are elements of imperial Chinese legal institutions that make judicial review attractive, once it is on the menu of constitutional design. Constitutional review may be more compatible with East Asian traditions than is democracy.

CONCLUSION

In presenting this description of the adaptation of a central legal institution of the modern state, namely judicial review, in countries with a non-Western political tradition, I have showed that judges are engaged in importing both institutional forms and substantive norms from abroad. But the very success of this project suggests that alleged incompatibilities with local traditions are overstated. One can construct a locally legitimate account of what is undeniably a modern institution of foreign origin. One consequence of the encounter between judicial review and new cultural environments is convergence: of institutional forms of judicial review; of the norms adopted by courts as they look horizontally to their sister institutions in other countries; and of the phenomenon of the judicialization of politics. Judiciaries all over are becoming arenas for political conflict (Tate and Vallinder 1995). The Constitutional Courts of Korea and Taiwan are not exceptions.

As institutions diffuse around the globe, they inevitably come into contact with dynamic cultural traditions that can transform practices, even as they are transformed by the practices. The embeddedness of law in local systems may or may not make intentional legal transfers difficult to predict, but does not mean we should long for a world of authentic local traditions untainted with what are increasingly global concepts of rights and legality.

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