CONSTITUTIONAL COURTS IN EAST ASIA: UNDERSTANDING VARIATION

Tom Ginsburg, University of Chicago Law School

After decades of authoritarian rule, East Asia has experienced a wave of democratization since the mid-1980s. Transitions toward more open political structures have been effectuated in South Korea, Taiwan, Thailand, Mongolia and Indonesia, and even the Leninist states of China and Vietnam have experienced tentative moves toward more participatory politics.[1] These political transitions have been accompanied by an important but understudied phenomenon: the emergence of powerful constitutional courts in the region. In at least four countries, Indonesia, Thailand, South Korea and Mongolia, constitutional courts created during the democratic transition have emerged as real constraints on political authority. A fifth court, the Council of Grand Justices in Taiwan, re-awakened after years of relative quiet to play an important role in Taiwan's long political transition to democracy.

Given the cultural and political history of the region, this is a phenomenon that might be seen as surprising. After all, most political systems in the region had until the 1980s were dominated by powerful executives without effective judicial constraint. The political systems of non-Communist Asia involved varying degrees of "authoritarian pluralism," wherein a certain degree of political openness was allowed to the extent it did not challenge authoritarian rule.[2] Thus there was little precedent for active courts protecting rights or interfering with state action.

Furthermore, traditional perspectives on Asian governance, resuscitated by proponents of "Asian values," have tended to view political culture in East Asia as emphasizing responsibilities over rights and social order over individual autonomy.[3] Both Buddhist and Confucian religious traditions emphasize the ideal of concentrating power in a single righteous ruler (the Buddhist *dhammaraja* or the Emperor enjoying the Mandate of Heaven) rather than establishing multiple

[1] Balme S and Sidel, M eds. (2007) *Vietnam's New Order*, New York: Palgrave Macmillan.

[2] Scalapino, R (1997) 'A Tale of Three Systems' 8(3) *Journal of Democracy* 150.

[3] Jacobsen, M (2000) *Human Rights and Asian Values,* RoutledgeCurzon; Mahbubani, K (2002) *Can Asians Think?* Steerforth Press; Davis, M (1998) The Price of Rights: Constitutionalism and East Asian Economic Development' 20 *Human Rights Quarterly* 303; Bell, DA (2000) *East Meets West: Human Rights and Democracy in Asia,* Princeton University Press; Bauer, JR and Bell, DA eds. (1998) *The East Asian Challenge for Human Rights,* Cambridge University Press.

seats of competing power and authority as a means of effective governance.[4] These traditional images of a single righteous leader have been exploited by rulers in the region, from Ho Chi Minh to Chiang Ching-kuo, usually to justify and perpetuate authoritarian rule.

Although the extent of the new constitutional constraint varies across countries and issue areas, it seems apparent that the phenomenon is real and lasting. It seems appropriate, even at this early juncture, to take stock of the phenomenon from a comparative perspective to determine what factors might explain the emergence of and success of constitutional review in East Asia. This paper focuses on four courts: the Constitutional Courts of Thailand, South Korea, Mongolia and the Council of Grand Justices on Taiwan.[5] We briefly describe the emergence of each court. We then analyze institutional design and court performance in comparative perspective. Finally we consider several possible factors that might help explain the emergence of effective constitutional constraint by courts. It is hoped that this exercise, consistently with the purpose of this special issue, might help contribute to the development of broader comparative theories to understand judicial review and its role in democratization.

THE EMERGENCE OF CONSTITUTIONALISM IN ASIA

Traditional Asian political thought provides few resources for developing an indigenous theory of judicial review of legislation.[6] Most East Asian societies had some influence from the imperial Chinese tradition, in which judicial and executive functions were not separated and all power emanated from a single figure at the center of the political system. Even in systems where power and authority were separated, as in Japan, the notion of an *independent* constraint on power was absent in traditional politics.

The strong history of centralized political authority throughout the region has continued in the twentieth century, and many have connected Asian authoritarianism with more general notions of political culture, arguing that there was a strong resonance between classical political traditions and the modern systems of one party, or one-and-a-half party, a form of governance that was

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[4] The situation is of course a bit more complicated than this characterization would suggest. In classical Confucianism, particularly as manifested in Korea rather than post-Ming China, advisors to the emperor exercised significant authority and can be seen as a competing power center. See Palais, J (1975) *Politics and Policy in Traditional Korea* Harvard University Press. In classical Buddhist thought, the wheel of power was also to be constrained by the wheel of *dharma*, so the *sangha* might serve as an alternative power center to state authority.

[5] Indonesia and Thailand are compared in the article by Harding and Leyland in this issue.

[6] Ginsburg, T (2002) 'Confucian Constitutionalism? The Emergence of Judicial Review in Korea and Taiwan' 27(4) *Law and Social Inquiry* 763; Ginsburg, T (2003) *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* Cambridge University Press.

remarkably consistent from Japan to Indonesia.[7] In South Korea, a series of military-authoritarian regimes governed, with one brief interlude in 1961, from the end of Japanese colonialism through 1987. In Taiwan, the Kuomintang (KMT) relied on traditional Chinese notions of government as modified by Sun Yat-sen's political thought to legitimize a quasi-Leninist authoritarian party regime. Thailand experienced a cycle of alternating periods of corrupt civilian and military governments. Mongolia had a governmental structure parallel to that of the Soviet Union, headed by a classically Leninist party. In all four countries, a meritocratically selected state apparatus provided continuity and exercised much influence, though of course the precise extent of that influence in the capitalist economies is an issue subject to intense controversy.[8]

Judicial review in East Asia was similarly constrained, even though it formally existed in many systems. Only the Philippine Supreme Court can be seen as exercising review with regularity. The Japanese Supreme Court has been constrained by the long rule of the Liberal Democratic Party and has issued only seven decisions on unconstitutionality of legislation.[9] In other countries, including Malaysia, Korea and Taiwan, judicial efforts to constrain the state were met with harsh attacks on the courts.

Beginning in the 1980s and accelerating in the 1990s, a global wave of democratization and political liberalization led to significant changes in East Asia and beyond. In many countries, this was accompanied by a shift away from traditional notions of parliamentary sovereignty toward the idea of constitutional constraint by expert courts. The causes were complex, and the pressures were global in character. The next section describes the constitutional courts under consideration in more detail.

Taiwan

Taiwan continues to be governed under an amended version of the 1947 Constitution of the Republic of China (ROC) adopted in Nanjing. This Constitution, which nominally governed all of

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[7] Pye, L (1995) *Asian Power and Politics: the Cultural Dimensions of Authority* Harvard University Press.

[8] Gownder, JP and Pekkanen, R (1996) 'The End of Political Science? Rational Choice Analyses in Studies of Japanese Politics' 22 *Journal of Japanese Studies* 363; Johnson, C (1982) *MITI and the Japanese Miracle* Stanfurd University Press; Rosenbluth, F (1989) *Financial Politics in Contemporary Japan* Columbia University Press; Kernell, S (ed.) (1991) *Parallel Politics: Economic Policymaking in Japan and the United States* Brookings Institution.

[9] Ramseyer, JM and Rasmusen, EB (2003). *Measuring Judicial Independence* University of Chicago Press; Beer, L and Maki J (2000) *The Constitutional Caselaw of Japan* University of Washington Press.

China, was emasculated for many years through the use of so-called "Temporary Provisions" that legitimated one-party government by the KMT. Democratic transition in Taiwan began in earnest only in the mid-1980s, when President Chiang Ching-kuo announced reforms and tolerated the creation of the opposition Democratic Progressive Party (DPP). After Chiang's death, Taiwan-born President Lee Teng-hui presided over a long and complex democratic transition, culminating in the election of DPP leader Chen Shui-bian as President in 2001.

The power of judicial review formally existed throughout this period, to be exercised by the Council of Grand Justices of the Judicial Yuan. Under the 1947 Constitution, the Council was composed of seventeen members who were appointed by the President with approval of the Control Yuan (a separate branch of Government) for renewable nine-year terms.[10] Constitutional amendments have lowered the number of Grand Justices to fifteen, shortened the terms to eight years, transferred approval power to the legislature, and provided for staggered appointments that coincide with the four-year presidential election cycle.[11] These amendments also assigned the power to declare political parties unconstitutional to the Council of Grand Justices, removing regulation of parties from the executive branch. The Council's primary functions are to issue uniform interpretations of law and to interpret the Constitution upon request from litigants or government agencies.[12]

After some early efforts to constrain the exercise of political power by government, the Grand Justices were punished by the legislature in the late 1950s. The legislature raised the voting threshold to issue constitutional interpretations and restricted interpretations to the constitutional text. From then 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 never accepted a case on the (dubious) constitutionality of the Temporary Provisions, which were the basis of authoritarian rule. The Temporary Provisions suspended the two-term limitation for the presidency and allowed the president to govern through decree powers without legislative approval.[13] The Council declined to

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[10] Although Article 81 of the Constitution grants "judges" life tenure, the Grand Justices are not considered to fall into that category.

[11] 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.

[12] 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.

[13] "Temporary Provisions Effective During the Period of Communist Rebellion." These were adopted in 1948 at the first meeting of the First National Assembly in Nanjing, and came into effect on May 10 of that year. For a discussion

hear challenges to these Provisions, and , issued a number of decisions that facilitated KMT rule within the confines of at least nominal constitutionalism. Most prominently, it issued a decision suspending elections to the National Assembly during the "national emergency", so that representatives elected on the mainland in 1948 to represent all of China continued to serve in power for several decades.

After the election of Lee Teng-hui in 1987, however, the Council gradually became more active.[14] It began to strike administrative actions that were vague or delegated too much power to the executive branch. In 1990, the Council was called on to rule on the constitutionality of the continued sitting in the National Assembly of members elected on the mainland in 1948. These members had become a major obstacle to reform since the Assembly was the body solely responsible for constitutional amendment. The Assembly thus had an effective veto over efforts to abolish it, as well as to undertake other institutional reforms desired by the reformers.

Council Interpretation No. 261, announced on June 21, 1990, called for new elections and forced the retirement of the decrepit old guard of the KMT. 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 Taiwan? . Without this 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 have been delayed indefinitely. Following the decision, several stages of constitutional amendments transformed the governmental structure of Taiwan to be more effective, only nominally retaining the fiction of governing all China.

After appointment of a new set of Grand Justices in 1994, the Council became more active in striking legislation and constraining executive authority. Many of the new Justices were Taiwan-born and thus more likely to share Lee Teng-hui's vision of an independent Taiwan. They systematically dismantled the quasi-Leninist system of KMT control, for example by ending the ban on rallies advocating secessionism or communism as a violation of free speech; allowing universities to refuse to allow military "counselors," whose presence in dorms had formerly been mandatory; and allowing teachers to form a union outside the "official" union structure.

The Council has also played a major role in introducing international norms of criminal procedure into Taiwan, forcing a complete revision of the Criminal Procedure Code. It struck provisions of an anti-hooligan law that had reduced procedural protections for those designated by

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of the constitutionality of the Temporary Provisions, see Mendel, FF (1993) 'Judicial Power and Illusion: The Republic of China's Council of Grand Justices and Constitutional Interpretation' *Pacific Rim Law and Policy Journal* 2: 157-89.

[14] See generally Ginsburg (2003), *supra* n 4, at ch. 5.

police as hooligans, and when the legislature modified the statute in question, the court demanded further revisions. It has also constrained both police and prosecutors in significant ways.

The Council has been involved in political controversies as well. After the election of the DPP's Chen Shui-bian as President in 2001, the Council embarrassed his government by preventing it from halting construction of a major nuclear power plant. It also was thrust in the center of political controversy when President Lee Teng-hui sought to retain Vice-President Lien Chan as "acting prime minister" after the 1997 presidential election. The legislature had protested this as a violation of the Constitution. Although the Constitution does not clearly state that the Vice-President cannot serve as Prime Minister, the Council found that this was not consistent with the spirit of the Constitution. It thus allowed Lien to retain office, though a few months later his government was removed for political reasons.

Constitutional amendments in 1992 provided for the Council of 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 which would no longer claim to be the titular government of all of China . The transfer of the power of regulating political parties to the Grand Justices reflects continuing German influence in Taiwan's constitutional law,[15] and was seen as progressive in that it took the determination of party unconstitutionality away from an Executive Yuan "Political Party Screening Committee," which had the previous January agreed to punish the DPP for its pro-independence plank. Giving this power to the Council is an important step in the Taiwan context.

The Council has thus been active in using the power of judicial review to strike legislation and administrative action. It has served as an *instrument* of democratization, both by giving life to the constitutional text and elaborating on the text in accordance with the constitutional spirit and international norms. It has also become involved in major controversies of a political character, though it has thus far avoided any major attacks on its powers. It is an exemplar of the role a constitutional court can play in facilitating democratization.

South Korea

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[15] 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, D (1997) *The Constitutional Jurisprudence of the Federal Republic of Germany (*2d ed.) Duke University Press at 223-29.

South Korea's last military regime, headed by Chun Doo-hwan, took power in a coup in 1979. In part because of a massacre of hundreds of non-violent protestors at Kwangju in May 1980,[16] the government enjoyed little legitimacy, and opposition politicians demanded that the regime allow direct elections and liberalization. The Korean democratization process began in earnest in 1986, when widespread demonstrations involving the middle class led military dictator Chun Doo-hwan to resign the Presidency. His successor, former general Roh Tae-woo, gave in to opposition demands for a directly elected presidency and oversaw a process of political negotiation that produced the 1987 Constitution.

One of the central features of this Constitution was the design of a new Constitutional Court, roughly along the lines of the German model. The Court is composed of 9 members who serve renewable six-year terms, with 3 members each nominated by the President, National Assembly and Supreme Court. I characterize this appointment method as "representative" because each institution has the ability to pick its nominees unimpeded. The Court has the power to consider the constitutionality of legislation or administrative action at the request of political bodies or a court, can resolve competence disputes among governmental institutions, and can respond to constitutional complaints from citizens if fundamental rights have been abused by government action or omission, or if an ordinary court fails to refer a constitutional question to the Constitutional Court.

Although earlier Korean Republics had formal provisions for judicial review, oscillating between centralized and decentralized models, judicial review in Korea had never effectively served to constrain the state. In the early 1960s, a Supreme Court decision striking a legislative act upset President Park Chung-hee, who shortly afterwards moved to concentrate his authority in the so-called Yushin Constitution of 1972. After these reforms, Park fired all the judges who had voted against his position in the earlier case. Constitutional review power under the Yushin Constitution was centralized in a Constitutional Council that remained dormant. It is thus not surprising that most observers of the 1987 constitutional reforms did not expect the Korean Constitutional Court to play a major role in the society.[17]

However, the Court has surprised these observers by regularly overturning legislation and administrative action.[18] Indeed, in its very first case, it struck as a violation of the equality principle

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[16] 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.

[17] Ginsburg (2003) ch. 7.

[18] West, J and Yoon, DK (1992) 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex' 40 *American Journal of Comparative Law* 73; Yang, K (1993) 'Judicial Review and Social Change in the Korean Democratizing Process' 41

of the Constitution a law providing that held that the State could not be subject to preliminary attachment orders in civil cases.The Court insisted that equality under the law requires treating the state no differently than a private citizen or corporation. In doing so it challenged the philosophical underpinnings of the postwar Korean political economy, wherein the state played a major role in directing private economic activity.

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 1989 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. In 1991, the Constitutional Court read Article 10 of the Korean Constitution, which grants citizens a right to pursue happiness, to encompass a right to freedom of contract.[19] Again, this is fairly radical in the formerly *dirigiste* Korean context.

The Court has also been involved in sensitive political issues. For example, it was drawn into efforts to achieve retroactive justice for the bloody Kwangju incident of the Chun regime. Many believe that President Kim Young-sam, who in 1992 became the first civilian to assume the Presidency, 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. Early in Kim's 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 on the constitutionality of special legislation, passed at Kim's instigation, to facilitate prosecution even after the normal period of statutory limitations had expired. In a carefully worded decision, 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 Chun and Roh early in his Presidency when the statute of limitations would not have been an issue. Ultimately, both men were found guilty, and subsequently pardoned at the instigation of President-elect Kim Dae-jung in December 1997.

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

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American Journal of Comparative Law 1; Ahn, KW (1998) 'The Influence of American Constitutionalism on South Korea' 27 *Southern Illinois Law Journal* 71.

[19] Ahn, ibid.

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 as a violation of the right to a speedy trial. The Court also found that a clause criminalizing anyone who "praises, encourages, or sympathizes with the activities of an anti-state organization or its members, or . . . by any means whatever benefits an anti-state organization" to be vague and overbroad, and to threaten constitutional guarantees of freedom of the press and speech, freedom of academic study, and freedom of conscience. The Court did not strike the NSA, but rather sought to limit and channel its application to constitutional purposes.

Perhaps the greatest political controversy the Court has had to deal with was the impeachment of President Roh Moo-hyun, an activist labor lawyer who took office in 2003 with a reformist agenda.[20] Roh faced a hostile National Assembly, and was soon beset by a split in his party and a corruption scandal related to campaign contributions erupted that October. Roh staked his future on a mid-term legislative election, but—in violation of South Korean law—appeared to campaign for his own party by urging voters to support it. The majority in the National Assembly responded with a motion for impeachment which passed by the necessary 2/3 vote.

Under Korean law, Roh was suspended from office and the Prime Minister assumed the duties of the President. The case was then sent to the Constitutional Court for confirmation, as required under the Constitution. During the deliberations of the case, however, the mid-term election was held and Roh's party received overwhelming support, winning an absolute majority in the Assembly.

Perhaps responding to the public's preferences, the Constitutional Court rejected the impeachment motion one month later. In addressing the issue, the Court bifurcated the issue into the question of whether there was a "violation of the Constitution or other Acts," the predicate for impeachment, and whether those violations were severe enough to warrant removal. Although the Court found that Roh had violated the election law provisions that public officials remain neutral, along with other provisions of law, they decided that it would not be proportional to remove the President for the violation. Instead, they asserted that removal is only appropriate when the "free and democratic basic order" is threatened. Roh's violations were not a premeditated attempt to undermine constitutional democracy. The Court further rejected some of the charges, namely those concerned with campaign contributions that took place before he took office.

In short, the Korean Constitutional Court has been playing a significant role in Korean politics and society. It has become an important site of political contestation, as interest groups have begun seeking to use the Court to achieve social change. 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 trod on careful ground in those cases likely to lead to political backlash, as in the impeachment case and in its handling of the National Security Act. At the time of this writing, the Constitutional Court is the most popular government institution in Korean society.[21]

Thailand

The Thai Constitutional Court was established with the 1997 Constitution. This emerged as part of a dramatic transition to democracy designed to break the cycle of coups and political corruption that had plagued Thailand's history since the end of the absolute monarchy in 1932. Depending on how one counts, Thailand had experienced between 17 and 19 coups, and had 16 different Constitutions during this period.[22] However, a coup in 1992 had provoked the ire of the middle class when protests were violently suppressed. Pressure grew for the renewal of democracy, accelerating after the King intervened to castigate the coup leaders. Ultimately the citizens' movement prevailed. The result was the so-called "people's constitution," adopted after widespread public input and debate. It was the first ever of Thailand's constitutions to include such input from the public.

Faced with the history of instability, and with an endemic form of electoral corruption that had made civilian rule as ineffective as the military was illegitimate, the drafters of the Thai Constitution focused on limiting governmental power. Academics played an important role in the drafting process, as the drafting commission was led by Chulalongkorn University Law Professor Bovornsak Uwanno. The Constitution emerged as a kind of mega-constitution, with 336 articles covering over 100 pages of text. In part this reflected the desire to specify rights in detail so as to avoid the possibility of mis-interpretation.

The Constitution had a number of radical features designed to increase participation and accountability. First, it tried to decentralize power to the hitherto moribund local governments. Second, it established extensive administrative rights to information, to sue the government and

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[20] See generally Lee, YJ (2005) 'Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective' 53 *American Journal of Comparative Law* 403.

[21] JoongAng Daily, July 3, 2007, available at http://joongangdaily.joins.com/article/view.asp?aid=2877553

[22] See Harding and Leyland (2008) 'The Constitutional Courts of Thailand and Indonesia' *JCL, this issue.*

receive reasons for adverse decisions by government. It introduced elections for the upper body of parliament, the Senate, and made it into a non-partisan body. It also created several new institutions to enhance participation and human rights protection. Two powerful new independent bodies were set up to improve the political process, an Election Commission and a National Counter-Corruption Commission (NCCC). The former was designed to minimize the chronic problem of vote-buying; it had the power to monitor elections, ban candidates and political parties, and order a re-run of any election it deemed to have been fraudulent.[23] The NCCC collected reports on assets from politicians and senior bureaucrats to ensure that there were no mysterious increases during the time they were in public service. Those who failed to report assets could be barred from office, subject to approval from the new Constitutional Court.

The new Constitutional Court was one of the key institutions designed to enhance legality and check a Parliament traditionally seen as a hotbed of corruption and special interest. It was to be a permanent body with 15 members appointed by the King upon advice of the Senate for nine year non-renewable terms. Members had to be forty years of age. In keeping with the need to secure various kinds of expertise in constitutional interpretation, the body included a variety of qualifications and appointment mechanisms. Cases could be referred to the Constitutional Court by ordinary courts in the course of litigation ; the presidents of each house of Parliament; the Prime Minister; and other designated political bodies. As in Fifth Republic France, there was a provision for minority groups of legislators to submit legislation before promulgation by the King, but no power of direct petition from the public.

In addition, the Court exercised a wide array of ancillary powers. Besides the power to confirm findings of and evaluate disclosures submitted to the Election Commission and NCCC described above, the Court could, *inter alia*: review whether any appropriations bill would lead to involvement of an elected official in the expenditure of funds (Section 180); determine whether an Emergency Decree is made in a real emergency (Section 219); determine whether Election Commissioners should be disqualified (Section 142); and decide whether political party regulations violate the Constitution or fundamental principles of Thai governance (Section 47). Because of the overarching concern with corruption that animated the 1997 Constitution, the Court had the power to demand documents or evidence to carry out its duties. In this sense it was a kind of inquisitorial Constitutional Court. The Court's early history was mostly uneventful but it quickly became embroiled in the politics surrounding billionaire populist Thaksin Shinawatra, who became Prime Minister in 2001.

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[23] In the first Senate election in 2000, the Election Commission threw out 78 out of 200 election results because of fraud.

Just before the election won by his Thai Rak Thai Party, Thaksin was found by the NCCC to have filed a false assets report. The Constitutional Court was called on the confirm the finding, and was put in a difficult position. In a divided decision that has been described as confused, the Court found that the false report hadn't been filed deliberately and allowed Thaksin to take the post of Prime Minister. Thus began a long chapter in which Thaksin used his money and influence to dominate Thai politics, undermining many of the guardian institutions that were supposed to protect the constitutional scheme.[24] The Court was tainted in some eyes for allowing Thaksin to take power, but on some occasions did constrain him. For example, it ruled that a couple of appointments, including those of Election Commissioner and the Auditor General had not followed proper procedure.[25] Still, the general perception was that these did not function as they should have. Following widespread allegations of electoral corruption in 2006, the Constitutional Court found that a legal case against him was non-justiciable.[26]

Frustrated with political institutions, opposition forces took to the streets. Thaksin called a snap election for April 2006, but this was boycotted by the opposition, leading to a constitutional crisis when too few members of Parliament could be seated. At this point, on April 26, 2006, the King met with the leaders of the Constitutional, Supreme and Administrative Courts and publicly called for them to resolve the constitutional crisis, suggesting they should void the April election. The Constitutional Court responded by annulling the election, and three election commissioners were jailed, on the grounds that the time allowed for the election campaign had been too brief and that some polling booths had been positioned to allow others to view the ballots as they were cast. Five new election commissioners, who had just been chosen after months of deadlock, would be replaced. Nevertheless, with political institutions at a standstill, the appointment process could hardly operate. The Constitutional Court seemed to have failed to resolve the problem completely. This is a paradigm example of the politicization of the judiciary that is a risk for constitutions placing so much power in the hands of guardians.

Thaksin's domination of politics eventually provoked a reaction from the military and in September 2006, he was replaced in a coup. Pointedly, the Interim Constitution promulgated by the military disbanded the Constitutional Court, even though most of the other guardian institutions were allowed to continue operating. In August 2007, a new constitution was approved by

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[24] Leyland, P (2007) 'Thailand's Constitutional Watchdogs: Dobermans, Bloodhounds or Lapdogs?' 2(2) *Journal of Comparative Law* 151.

[25] Leyland, ibid. at 159.

[26] Leyland, ibid. at 168

referendum, and a new Constitutional Court established. The new Court is a nine-member body, serving a single nine-year term selected in simpler fashion by a selection committee.[27]

The Thai story is of a court that disappointed many of those who had high hopes in it, yet it is not fully clear exactly what the court could have done to resist the billionaire populist whose reach extended into virtually every institution in Thailand. If anything, the story cautions against expecting courts to be able to do too much, and to single-handedly save a democratic system from itself.

Mongolia

The world's second communist country, Mongolia was governed for many years as a *de facto* satellite of the Soviet Union. This changed only in 1989 when demonstrations led by intellectuals led the ruling Mongolian People's Revolutionary Party (MPRP) to revise the political system and allow for multi-party elections. After a brief period of transition, these reforms were crystallized in the 1992 Constitution.

The Constitutional Court (called the *Tsets* from the traditional word for a judge in Mongolian wrestling) was designed to supervise the Constitution. Although the drafters of the Constitution briefly considered the institution of American-style decentralized judicial review, the adoption of the Kelsenian centralized model was considered more compatible with Mongolia's civil law tradition. The Court had nine members, three selected by each of the President, the Parliament and the Supreme Court. Cases can be brought by ordinary citizens through constitutional petition, as well as referral by various political institutions.

In its early years, the Court's primary role was in resolving competence disputes between the powerful legislature and the directly elected President. The Court also responded to citizen complaints and issued a number of decisions overturning government actions that violated the constitutional text. However, the Court's own decision that the Constitution did not give it jurisdiction over ordinary court decisions meant that certain areas important for human rights protection, most notably criminal procedure, were outside its purview.[28]

The Court has been somewhat hampered by a peculiar institutional design that allowed the Parliament to reject initial findings of the Court. In the event the Parliament rejected the decision, the Court could hear the case again *en banc* and issue a final, binding decision by a two-thirds vote. This institutional design probably reflected residual socialist notions of parliamentary sovereignty, as well as a similar scheme that existed in the Polish Constitution before amendments in 1997.

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[27] Constitution of Thailand 2007, Sec. 200, 202.

[28] Ginsburg (2003) ch. 6.

Although the Mongolian Court's initial decisions were accepted by the Parliament, the election of an overwhelming majority of MPRP to the Parliament in 1998 meant that the party had the easy ability to reject Court decisions as a matter of course.

This situation was exacerbated by a particular series of poorly considered decisions by the Court on the shape of the political system.[29] Following the first election victory of the opposition coalition in 1996, the Court decided that a constitutional clause that said "members of parliament shall have no other employment" prevented the Government from forming the cabinet out of sitting parliament members. This question went to the core of the nature of the political system: was it a parliamentary system or a presidential one? The case produced a series of institutional conflicts between the parliament and the Court. After the Court rejected legislation passed to allow the government to be formed out of parliament as unconstitutional, the parliament passed a series of constitutional amendments designed to remedy the defect. These amendments were themselves rejected by the Court as unconstitutional. The crisis was only resolved some five years later in 2001, when the Court finally backed down and allowed a second round of constitutional amendments to go forward. The story of the Mongolian Court is thus one of poor decision-making that squandered institutional capital that had been built up in the very first years of the institution.

Summary

These four cases illustrate a range of environments in which constitutional courts operate. They include former communist regimes and former military regimes. They range geographically and culturally. But all four courts are playing an important role in political conflict, and with the somewhat strange exception of Mongolia, have by and large helped to resolve these conflicts effectively. All the courts have played a role in underpinning and facilitating democratization. The next sections consider some comparative questions in light of these brief case studies.

UNDERSTANDING INSTITUTIONAL DESIGN

The four courts under consideration exhibit a range of features. Yet all four reflect the Kelsenian model of a centralized institution, paradigmatically embodied in the German Constitutional Court, rather than the American decentralized model in which any court can make a declaration of unconstitutionality. This choice of the continental model was made despite substantial American influence on the law and politics of Korea and Taiwan, and American advice into the Mongolian

[29] Ginsburg, T and Ganzorig, G (2001) 'When Courts and Politics Collide: Mongolia's Constitutional Crisis' 14 *Columbia Journal of Asian Law* 309. See also Ginsburg (2003) *supra* n 4, ch. 6.

constitutional drafting process. In this sense, courts in Asia are reflecting the dominant role of the continental model in all legal systems except those subject directly or indirectly to British colonialism. In a global sense, only a very few courts without British or American colonial experience have adopted a decentralized model of judicial review.

The following table summarizes several features of institutional design of the four courts.

Table 1 : Features of Institutional Design

	Thailand	**Korea**	**Taiwan**	**Mongolia**
date of establishment	1997-2006	1989	1947; as modified by constitutional amendments	1992
# members	15	9	15	9
How appointed	7 elected by top courts; 8 selected by a mixed commission as qualified in law and political science; confirmed by Senate	3 each from Court, President and National Assembly	By President with approval by the National Assembly	3 each from President, Parliament and Supreme Court
Term length in years	9	6	8	6
Terms renewable?	No	Yes	No	Yes
Constitutional petitions from public?	No	Yes	No	Yes
Abstract/concrete review	Both	Concrete	Abstract but includes referrals from ordinary courts	Both
Review of legislation ex post/ ex ante	Both	Ex post	Ex post	Ex post

Decisions final?	Yes	Yes	Yes	Initial decisions can be rejected by the legislature, but subsequently confirmed by *en banc* sitting of court
Important ancillary powers	Overseeing corruption and electoral commissions	Impeachment, dissolution of political party	Declare political parties unconstitutional	Impeachment, overseeing electoral commission

While the prestige of the German model may explain the decision to centralize review in a single designated body, the details of institutional design are likely to reflect in large part the political configuration during the time of constitutional drafting. Thus the appointment mechanisms are most complex in Thailand, wherein drafters sought to insulate the justices from politics by setting up an intricate array of appointment mechanisms and committees. Although many American states and several countries use mixed committees to appoint ordinary judges, the Thai scheme is particularly byzantine and reflects the importance of various professional factions in the drafting process. In Taiwan, in contrast, the drafting of the constitutional text in 1947 reflected the dominance of Chiang Kai-shek in the KMT. The President plays the major role in appointing the Grand Justices, a desirable feature for a powerful figure certain to win the Presidency.

Mongolia and Korea utilize the Italian model of representative appointments by each of three political branches. This representative model may be desirable when parties are uncertain of their position in government after the constitution is adopted. Whereas Chiang Kai-shek knew he would be able to appoint the Grand Justices and was happy to keep the power centralized in the Presidency, situations of greater political uncertainty are likely to lead drafters to ensure wide representation on the court.[30] When each institution appoints a third of the members, no institution can dominate the court.

[30] Ginsburg (2003), ibid.

This dynamic is best illustrated in Korea, where the Constitution was drafted behind closed doors by three factions with roughly equal political support.[31] Situations of such uncertainty mean that each faction believes it is likely to be *out* of power. This may also give the drafters the incentive to include the power of constitutional petition by citizens. Constitutional? petition guarantees that political losers will have access to the constitutional court in the event the winners trample their rights.

Another issue in constitutional court design is that of term length. It is usually suggested that longer terms are likely to lead to more independent adjudication. There seems to be a tradeoff in our four cases between short renewable terms (Korea and Mongolia) and longer non-renewable terms (Thailand and Taiwan). While this does not reflect any apparent political pattern, it is interesting that the shift to non-renewable terms in Taiwan only took place after democratization began in earnest; in the one-party period it may have been politically useful for the KMT to wield the threat of non-reappointment over the Grand Justices.

This illustrates that dominant party regimes may be in a better position to hinder strong review power in constitutional design. Strong parties that believe they are likely to control the legislature are likely to want weaker courts. In both Mongolia and Taiwan, strong party regimes built in controls over the court in the design process: in Mongolia through the anomalous institution of parliamentary approval of initial decisions by the court on constitutionality, and in Taiwan, through the centralized appointment mechanism. The more diffuse political environments of Thailand and Korea, wherein multiple political parties were competing for power, may have contributed to more powerful court design.

Other features of institutional design reflected political concerns associated with particular circumstances. Examples include the emphasis on anti-corruption and the mechanism of abstract pre-promulgation review of legislation in the Thai Constitutional Court design. These features both reflect the overarching distrust of partisan politics in Thailand. As the French experience has shown, abstract pre-promulgation review tends to lead to the insertion of the constitutional court into the legislative process.[32]

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[31] Other institutions of the 1987 Constitution, including the single term Presidency, reflect the uncertainty that any one of these three factions would win the first election. The single term has allowed the presidency to be rotated by the three major political figures involved in the drafting—Roh Tae-woo, Kim Young-sam, and Kim Dae-jung.

[32] Stone, A (1992) *The Birth of Judicial Politics in France* Oxford University Press.

In short, institutional design of constitutional courts should be understood as reflecting a process of adapting foreign models with local institutional needs. This account suggests that political considerations play an important role in understanding court design in Asia and elsewhere.

UNDERSTANDING COURT PERFORMANCE

What about the performance of these constitutional courts? What roles are they playing? While of course each court presents its own story in a distinct political social and cultural context, several broad themes emerge from the regional snapshots provided above.

First, constitutional courts have been useful in striking, one at a time, elements of the old system. They served as consolidators of democracy, rather than the bodies triggering the process. This function was particularly important in the relatively gradual transitions from authoritarian rule in Taiwan and Korea. In Thailand, the military regime was not systematically entrenched in the society, having been in power only a short time and reflecting the less pervasive character of the Thai state in controlling the ordinary lives of its citizens. The primary threat to democracy was seen to be the corrupt political process itself, and the constitutional text reflected that concern. In Mongolia, the Court played less of a rights-protecting role than in Korea and Taiwan; this may have been appropriate since the complete break with the past marked by the transition from socialism meant that by definition the old regime was less intact.

Second, ancillary powers of constitutional courts are important, though they have received relatively little scholarly attention in Asia and elsewhere. In Thailand, for example, cases involving constitutional review of legislation were not nearly as important as the Court's role in supervising the electoral process.[33] The most prominent case in Korea's constitutional history was an impeachment case—far from the exercise of judicial review as classically defined. Giving the Council of Grand Justices on Taiwan the ability to declare political parties unconstitutional marked a major step in ensuring that such declarations would be conceived of in legal rather than political terms, and reflected a shift toward the rule of law.

Third, all four of the constitutional courts have been involved in issues related to the composition of government. In Thailand, the high profile case approving Thaksin's appointment as Prime Minister is the best example; in Taiwan and Korea the courts adjudicated interim appointments of the Prime Minister by a President in a split executive system, and the Korean impeachment also involved government composition in one sense. The Mongolian Constitutional Court was called on to determine the fundamental character of the political regime as parliamentary or presidential. In all these cases, the transfer of political struggle from the streets to the courtroom

[33] Harding and Leyland, this issue.

is a significant step. Regardless of the outcome, the fact that political forces have an alternative place to resolve core questions may facilitate democratic consolidation.

These types of disputes, however, place constitutional courts in difficult positions in that they are called on to wield expertise that they may not have, and may have to substitute for more democratic processes. One need only consider the reaction to the United States Supreme Court's system in *Bush v. Gore*[34] to understand the perils associated with these kinds of decisions. Arguably the Korean and Taiwanese courts took the best approach by ducking the issue and letting the political process decide the outcome. In Thailand, the Court could not avoid the issue, but in the end it took a similar approach by deferring to the democratic majority that had elected Thaksin despite reports of his failure to file a complete declaration of assets with the NCCC. In contrast, the Mongolian Court derailed the entire constitutional system by refusing to allow the newly elected majority to form a government of its choosing. This led to a severe conflict with the political branches and the depletion of the court's authority. The lesson then, is one of caution on core issues of the political process for courts in new democracies.

This leaves attention to fundamental rights and constraint of state authority as the real roles the courts can play. Here the Courts of Korea and Taiwan have been active in introducing international norms into new contexts, with both courts forcing significant reforms in criminal procedure. The Mongolian Court also played such a role, at least early in the post-socialist period. Given the less severe character of Thai criminal justice even under the military government, it is perhaps understandable that the court has not yet emerged as a major voice in this area.

This discussion has implicitly assumed that courts are strategic actors. Courts make choices as to what cases to hear and how to handle them. Because judicial behavior and motivation in general is so poorly understood, it is difficult to develop predictive conclusions about how courts will act in particular cases.[35] What we *can* conclude, however, is that variations in performance may also be affected by broader cultural, political and social factors. The next section considers some of these.

EXPLAINING THE EMERGENCE OF CONSTITUTIONAL REVIEW

What are the implications of this story for broader comparative understanding of the emergence of constitutional review? Because the adoption of constitutional review is intimately bound up in the broader phenomena of global political liberalization and expansion of judicial power, it implicates

[34] 531 U.S. 98 (2000).

[35] Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.

issues much larger than can be resolved here. However, we will use these four cases to draw some conclusions on factors that might be relevant to the conditions for the successful emergence of constitutional review.

Cultural traditions are sometimes seen to provide important supporting conditions for the exercise of legal authority. From this perspective, judicial review is the ultimate expression of a tradition of autonomous law associated with the modern West. The four environments considered here have no cultural tradition of autonomous law. The robust exercise of judicial power in all settings helps to confirm that cultural factors are not insurmountable obstacles to judicial review. We need not rehash the entire debate over "Asian values" except to note that, too often, those arguing for Asian exceptionalism reason backward from the existence of illiberal regimes to the values that allegedly support those regimes. At a minimum, we can conclude that the existence of non-Western values at one point in history is not an insurmountable barrier to the later emergence of constitutional constraints on politicians.

One factor that might be called cultural concerns the *receptivity* of the society to foreign ideas, a factor particularly important in an era of "globalization". All four countries considered here are drawn from small countries. Three of them have historically been subject to Western influence while a fourth, Mongolia, has recently turned to the West as a counterweight to Chinese and Russian influence. Such small countries may be particularly open to influence from the modern West because of their fear of cultural and political domination by more proximate large states. Judicial review from this point of view is one element of a package of modernizing reforms that are adopted because of their very western-ness, as part of a complex security strategy.

"Westernization" gives the West a stake in the society, and hence may deter the large neighbor from expansionism. Because all four of our case studies share this attribute of smallness, we cannot draw firm conclusions about the relevance of this factor for the adoption and development of judicial review. However, we can say that Western influence did not determine institutional form. For Taiwan and Korea, the United States provided a reference society that influenced institutional and systemic changes during the long authoritarian period. Yet neither country has adopted the decentralized system of judicial review. Institutional design appears to be an issue where local, not international, forces are determinative.

One might also expect that *prior history of judicial review* would provide an important source of support for constitutional judges in new democracies. After all, it is generally hypothesized that democratization has been easier in those countries where authoritarian regimes had displaced prior democracies. History, the argument runs, provides a source of inspiration as

well as models of institutional design for new democracies.[36] In the Eastern European context, for example, the inter-war history of democracy in Czechoslovakia and Hungary are thought to support the more rapid democratization of those countries than the ambivalent cases of Rumania and Bulgaria.[37]

Yet prior experience can constrain as well as inspire. In particular, when an institution exists under authoritarianism, it may develop an institutional culture that favors restraint. Further, it is unlikely to be seen as legitimate in the very early years of democratization. In the case of Taiwan, the Grand Justices existed under the authoritarian regime, and this may have hindered rather than supported the emergence of a more activist conception of judicial review. The Council of Grand Justices in Taiwan was quite cautious in building up its power, treading very carefully, in part because its legacy complicated the task of identifying core constituencies. Even its most famous decision, forcing the retirement in 1990 of the legislators who had been elected on the mainland decades earlier , is perhaps best understood as siding with one ascendant faction of the KMT over another, and not truly about the constraint of power. The Korean and Mongolian Constitutional Courts, as new institutions, had a bit more freedom to operate. In Thailand, formal provision for the exercise of judicial review in earlier constitutions lay dormant. This suggests that prior history is neither a necessary nor sufficient condition for the successful functioning of a particular constitutional court.

Some scholars have attempted to tie the exercise of judicial power to the *type of previous regime*, with a peculiar threat posed by military authoritarians.[38] Our cases provide counter-evidence to the assertion that military authoritarian regimes hinder the development of judicial review. The Korean Constitutional Court has developed active judicial review in the shadow of a departing military-authoritarian regime. Thailand's 1997 Constitution, embodied in the Constitutional Court itself, was designed in part to secure the permanent removal of the military from politics. Taiwan's Council of Grand Justices has also systematically dismantled the military-Leninist system of control of civil society. It may be helpful that the only tool the military has to influence the court is to overturn the entire constitutional order, the political equivalent of a nuclear warhead; civilian political parties and institutions have more subtle ways of engaging with the court to communicate their preferences and to encourage judicial modesty. Paradoxically, this means

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[36] Elster, J, Offe, C and Preuss, UK (1998) *Institutional Design in Post-communist Societies* Cambridge University Press, at 60-61.

[37] Sadurski's article XXX

[38] Ackerman, B (1997) 'The Rise of World Constitutionalism' 83 *Virginia Law Review* 771-97.

military regimes may actually be associated with judicial autonomy—after all, both officers and judges see themselves as professionals insulated from the dirty politics of legislatures and parties.

The *pace of transition*, in particular the timing of constitutional reform, may affect the exercise of judicial review. In Korea, as well as Mongolia and Thailand, constitutional reform was accomplished quickly at the outset of the transition process (though other democratic reforms were gradual in Korea). This provided the courts with an identifiable constitutional moment to invoke. Where constitutional reform is a gradual process, as in Taiwan, the court must fear the real possibility of constitutional override of any unpopular decisions and therefore will likely be more cautious. Further research on other countries is necessary to evaluate this hypothesis, but our cases suggest that quick transition can support judicial review.

Ackerman (1997) has suggested that *strong presidencies* are helpful for the exercise of judicial review.[39] In this regard, one might add that the adoption of a French-style split executive creates a need for independent courts to arbitrate institutional disputes. Three of our countries have such split executive systems, while Thailand relies on a traditional parliamentary structure of government. Korea and Taiwan were both more strongly weighted toward presidential power than the weak semi-presidential system in Mongolia.

Probably more important is the type of party system. The party system is the crucial factor that determines how the institutions interact, not the mere fact of presidentialism. If a single dominant party exists and controls the legislature and executive, inter-institutional conflict is likely to be minimal. Where divided government holds, however, institutional conflicts will provide the court with a role to play and more policy space in which to render decisions. Split executive systems often produce divided government, and Korea and Taiwan, the two cases with arguably the most robust exercise of judicial review, both had periods of divided government in the 1990s. In Mongolia, the Court's challenge of an overwhelming parliamentary majority after 1998 put it into a battle it could not win; ultimately it had to capitulate.

Certain other variables may affect demand for judicial review by creating incentives for plaintiffs to bring cases to courts. In particular, a *vigorous civil society* provides interest groups that may seek to challenge government action in courts.[40] Furthermore, an *unrestricted legal profession* may create incentives for individual lawyers to act as entrepreneurs by pursuing constitutional litigation. These two demand-side variables would support plaintiffs' propensity to bring

[39] Ackerman, B (1997) id.

[40] Voigt, S (1998) 'Making Constitutions Work – Conditions for Maintaining the Rule of Law', 18 Cato Journal 191.

constitutional cases. Charles Epp has argued that these are necessary underpinnings for a "rights revolution."[41]

On both of these scores, Korea provides counterevidence to the hypothesis. In contrast with Taiwan and Mongolia, associational life has been limited in Korea.[42] While certain types of private associations exist, for the most part these are not focused on public-interest issues of the type that would lead to greater demand for judicial review. If anything, the presence of an increasingly active system of judicial review has encouraged the formation of new interest groups, suggesting that the causal relationship runs in the opposite direction. Similarly, Korea and to a lesser extent Taiwan have historically placed significant restrictions on the practice of law, limiting entry into the profession to a greater extent than Thailand. This should dampen demand for judicial review. But Korea's activist system of judicial review existed and thrived prior to recent efforts to liberalize the profession.

More broadly, however, the emergence of a *middle class*, seen to be so important in the broader process of democratization, may be a necessary condition for constitutional review to thrive. All four countries can be said to have vigorous middle classes that played an important role in demanding democratic reforms.[43] The presence of this broader middle class allows the court to have an alternative means of legitimation—the court can protect itself from attack by political institutions through building up a wellspring of popular support. Of course, such a move requires the court to take a particular strategy in choosing cases of most interest to the middle class and their rights-claims. The Mongolian Court notably declined to do this, and found itself without much public support when it became embroiled in conflicts with the parliament and government. In contrast, Korean and Taiwan societies have seen the development of some interest groups that seek to advance their causes through litigation. Such groups by definition have a stake in the Court's continued independence and vitality.

Table Two summarizes some of the possible explanatory variables discussed here. The obvious conclusion is that constitutional courts can emerge and thrive in a variety of environments. Even the rather odd Mongolian case should not be generalized to other post-socialist contexts, for

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[41] Epp, CR (1998) *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* University of Chicago Press.

[42] Koo, H (ed.) (1993) *State and Society in Contemporary Korea* Cornell University Press.

[43] Compton, RW (2000) *East Asian Democratization: Impact of Globalization, Culture and Economy* Praeger.

some such courts have been very effective at building up effective support and constraining their politicians. The Hungarian case is perhaps best known in this regard.

Table 2: Explanatory Variables

	Thailand	Korea	Taiwan	Mongolia
Confucian cultural tradition	No	Yes	Somewhat	No
colonialism	None	Japanese	Japanese	Russian
previous judicial review?	Minimal	Yes	Yes	No
previous democracy?	Yes	Yes	No	No
type of previous regime	Military	Military	Dominant Leninist party	Dominant Leninist party
type of transition	Quick	Quick	Gradual	Quick
governmental structure	Parliamentary	Semi-presidential	Semi-presidential	Semi-presidential
divided government?	No	Yes	Yes	No
middle class?	Yes	Yes	Yes	Yes*
capitalist economy?	Yes	Yes	Yes	No
History of authoritarian pluralism	Yes	Yes	Yes	No

CONCLUSION

In recent decades, judicial review has expanded around the globe from the United States, Western Europe, and Japan to become a regular feature of constitutional design in Africa and Asia. Constitutional courts have exercised review to challenge political authorities when conflicts arise among government institutions or governments impinge on individual rights. Although the formal power to exercise judicial review is now nearly universal in democratic states, courts have varied in the extent to which they are willing to exercise this power in practice.

The four courts described above all emerged as major political actors as part of the democratization process. We draw four main conclusions from this account of the Asian cases. First, these cases highlight the important role of constitutional courts in mediating the political process, sometimes by using powers ancillary to the primary, high-profile function of reviewing legislation for constitutionality. Here the existence of the constitutional court can facilitate institutional dialogues among political actors, encouraging peaceful resolution of political disputes and facilitating consolidation.

Second, the emergence of constitutional review in Asia suggests that supposed cultural barriers to the emergence of constitutional constraint are no longer operative, if they ever were so. Third, although a wide variety of social contexts can support constitutional review, the existence of a middle class appears to be an important factor in creating a bulwark of support for constitutional courts.

Fourth, it seems that political diffusion matters. Dominant parties are less likely to design open and powerful systems of judicial review, and are less likely to tolerate powerful courts exercising independent power once the constitution enters into force. In contrast, constitutional design in a situation of political deadlock is more likely to produce a strong, accessible system of judicial review as politicians seek political insurance. Political diffusion creates more disputes for courts to resolve, and hinders authorities from over-ruling or counter-attacking courts. In this sense, the emergence of powerful constitutional courts in Asia *reflects* democratization, and is not counter-democratic as has been argued in the U.S. context.