

**THE POLITICS OF COURTS IN DEMOCRATIZATION:
FOUR MOMENTS IN ASIA**

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Draft for presentation at the Constitutional Court of Korea, December 2009

Abstract: This paper considers four moments in which high courts in Asia were called on to decide whether prominent political figures could retain or take office. These type of cases pose great dangers for courts, as many of the usual devices used to enhance institutional legitimacy are unavailable. In each of the four cases, courts were called on to arbitrate the balance of power between established and new social forces, and in each, the courts seemed to respond to majority preferences. The paper generalizes from these cases to consider the roles that courts can play in facilitating democratic transition. Most commonly, courts are involved in deepening democratic consolidation, once transition is secured. They thus play an important, but second-order, function in democratization. The analysis is important for understanding both the possibilities and limits of law in democratic transition.

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I. INTRODUCTION

Scenario One: In a country with only a decade-old democracy, the country's newly elected president is the ultimate political outsider—an activist lawyer, relatively young, whose party does not hold a majority in the parliament. His opponents launch fierce political attacks, and then impeach him for seemingly trivial offenses. The country's widely respected Constitutional Court is called on to decide whether to uphold the impeachment and decides that, although the President violated the law, he can retain office.

Scenario Two: In a hotly contested presidential campaign he looks certain to lose, the incumbent (another former activist lawyer) is shot the day before the election. He wins by a razor-thin margin, and the election is contested. Meanwhile, the executive and legislative branch set up competing investigative committees to determine the source of the shooting. The election case is sent to the courts to resolve, along with constitutional disputes about the investigative committees. The court held that the election was valid, the investigation constitutional, and the leader takes power.

Scenario Three: In a country with a long history of political instability, a new constitution is adopted, considered the most democratic in the country's history and featuring several new independent institutions to regulate the political process. Soon thereafter, a billionaire who earned a fortune earned in the telecommunications sector enters politics, creates a party and develops a populist political program. His party wins a majority of parliamentary seats outright, the first time that has occurred in the country's

history. But he is accused of campaign finance violations and the country's new Constitutional Court is called on to decide whether he should be allowed to take office. The Court holds that he can. Five years later, the leader is deposed by a military coup d'état and a new constitution drafted; after new elections, the courts again find themselves in the midst of repeated challenges to civilian politicians.

Scenario Four: A country's long-serving military ruler decides to extend his tenure through running for President. The country's Supreme Court, which has been engaged in a struggle with him over various issues, decides that he can run, but then agrees to hear a political challenge to his re-election. The Court announces that it will issue a decision clarifying whether the election is valid after it is held. A few days before the decision is due, the ruler declares a state of emergency, arrests several of the judges and decries judicial activism as a threat to the nation. Riots ensue; a crackdown follows and opposition politicians are arrested. Within a few months, the ruler is forced from power and elections are held, returning civilians back to power.

These four scenarios took place in recent years in various countries in Asia Korea, Taiwan, Thailand, and Pakistan respectively. In all four cases, courts were called upon to decide whether or not an elected political leader could take or continue to hold office. In all four, the threat of constitutional crisis lurked in the background, for the military has had an active role in all four polities and democracy was perceived to be fragile. Deciding such cases is difficult enough for an established court with a deep cache of

institutional capital, as the United States Supreme Court learned in *Bush v. Gore*.¹ They are all the more challenging for a court that is itself relatively new.

These types of decisions are critical junctures for the political and constitutional system; they are moments of choice whose downstream effects are likely to be significant (Pierson 2004), even determining whether the country will remain a democracy.

Examining how these courts handled these opportunities and challenges has the potential to inform theories of the causes and consequences of judicial empowerment, as well as our understanding of the role of law in democratization.

It is also important to try to understand these critical decisions simply because they seem to be arising with greater frequency. This is itself the result of a couple of different factors. Anecdotally, it may be that intensified political competition and democratization have increased the frequency of razor-thin electoral margins, creating more demand for institutions to resolve disputes. In addition, the expansion of judicial power in general, and, more specifically, of the assignment of ancillary powers beyond judicial review to constitutional courts in recent years, has put courts in the center of political conflict. As courts have expanded their range of substantive decision-making over a broader set of issues, they have been assigned powers that increasingly place them in the center of major constitutional crises. Such moments do not always involve clear legal issues. But the courts are the natural institution to turn to, with their inherent social logic of dispute resolution (Shapiro 1981) and their frequently impressive records in other arenas. We should thus expect to see more such moments in the future.

Being forced to pick a leader, either to take or retain power, presents the courts with an enormous institutional challenge. Recall Shapiro's (1981: 1) classic framework

¹ 531 U.S. 98 (2000).

suggesting that much of judicial legitimacy comes from the (false) image of an independent judge applying pre-existing rules after adversary proceedings to reach a dichotomous solution. One way in which courts deal with the disjuncture between this imagery and the need to secure compliance is by providing mediate solutions. The problem for courts in cases where they must pick leaders is obvious: there is no way to split the proverbial baby, and so one or the other of the two parties is going to be very upset.

One can imagine several possible responses to this state of affairs. Perhaps courts will fall back on other devices from the legitimating imagery, emphasizing pre-existing rules or the procedural integrity of the process, so as to convince the loser to comply. These solutions may work up to a point. Ultimately, however, a decision must be rendered, and if courts are to retain authority, it must be complied with. Since judicial power to force compliance is minimal, courts rely on other agents to ensure that decisions are effectuated. But why do these other agents enforce compliance? Ultimately, in a democracy, the issue comes down to whether or not citizens are willing to enforce the terms of a constitutional bargain, or to demand that their agents do so (Hardin 1989; see also Vanberg 2004). This suggests that, when faced with the binary question of whether a prospective leader can hold office, the courts ought to ask: which decision is likely to command the support of the citizenry? Taking a majoritarian approach may make sense, particularly in a democracy, for it ensures the greatest likelihood of compliance.

This simple framework is somewhat complicated by introducing dynamic considerations. In a new democracy, the issues are likely to implicate not just which group of elites runs the country, but whether democratization proceeds at all. Consider

the “Przeworski moment” when the incumbent party has lost an election for the first time but retains power until the legal transfer of power occurs (Przeworski 1991; Weingast 2005). Such moments are crucial junctures at which many new democracies fail, when incumbents refuse to transfer power. Courts called on to pick winners at such junctures are caught between a proverbial rock and hard place in seeking compliance. The logic of dictatorship says to bless the incumbents; the logic of democracy says to side with the new majority. Choosing one side or the other will determine the character of the political regime for years to come.

Even after an initial transfer of power has occurred, courts may find themselves to be arenas in which those out of power challenge the rulers’ authority, either in new elections or in attempts to recall the leaders. They are thus in the position of distributing political goods to one or the other contentious party. How courts handle such situations is worthy of further investigation. Should they side with one side consistently? Should they seek solutions that deliver gains for both sides? These are issues of judicial strategy that may be illuminated in studying decisions choosing leaders.

The paper also seeks to place these moments in the broader context of trying to understand the role of courts in democratization. The relationship of courts to democratization is the subject of a small but growing literature in comparative judicial studies. The paper begins by presenting a general framework for understanding these various roles. It then reviews the four “moments” described in summary form at the outset of the paper, providing more political and legal context while trying to gauge the causes and consequences of the individual decisions. It uses these moments to illustrate the roles elaborated in Part II.

The paper concludes that the “moments” described in Part III elucidate a general finding: courts are typically, though not exclusively, involved in democratization as “downstream consolidators,” an important but ultimately secondary role. Only in very rare instances can courts tip a system in a direction it was not already leaning. We thus learn something about courts in general from examining their performance in picking leaders.

II. THE POLITICS OF COURTS IN DEMOCRATIZATION

What is the role of courts in democratization? Let us distinguish three alternative scenarios: courts as upstream triggers for democratization; courts as downstream guarantors of authoritarian position; and courts as downstream democratic consolidators, in which courts follow the initial decision to democratize and facilitate the process. A fourth possibility is judicial irrelevance, in which courts play no discernible role, either as guarantors, triggers or consolidators.

Upstream Triggers of Democracy

In very rare instances, courts play a central role triggering democratization when the autocrat is *not* seeking to withdraw, and opposition arises. In these situations, courts are in fact at the center of the transition decision, providing *focal points* for mobilization. These are situations of conflict and contingency, in which democratization has not yet been embarked upon.

To understand how a court decision can play such a role, I draw from recent work by Weingast (1997). In his model, a ruler conspires with some citizens to dominate other

citizens, using a combination of repression and selective incentives for regime insiders. The dominated group can be very large, but can only limit the ruler if it can coordinate to overturn the narrow ruling coalition. Coordination is very difficult to achieve. The difficulty is that citizens may not agree on what exactly constitutes a violation of the rules, and may not know whether other citizens will join in an effort to take power. Any subset of citizens thinking of rising up to challenge the regime can only succeed if others join them. Otherwise the opponent ends up in jail or worse and the regime maintains power (as the tragic events last month in Myanmar illustrated). Being uncertain as to what other citizens will do, the prospective mobilizers will likely stay quiescent and authoritarianism will be sustained. Only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge and be sustained.

To achieve coordination requires focal points (Schelling 1960: 57). The particular focal points that will allow citizens to find ways to coordinate and to overcome their collective action problem are not obvious *ex ante*, and are not uniform across all times and places. My argument is that, in some limited conditions, court decisions can play a role in helping citizens to coordinate, and force the autocracy to liberalize. The court decision serves as a focal point for citizens to coordinate their efforts against the regime.

Why might citizens focus on a court decision? First a court decision can provide clarity as to what constitutes a violation of the rules by the government. Lacking an authoritative pronouncement, regime opponents might disagree about whether a violation occurred and may thus fail to coordinate to enforce the rules. By creating common

knowledge that a violation of the rules has in fact occurred, a court decision can help citizens to overcome the collective action problem.

Second, a court decision against the government is an information transmission device. It communicates the view that the government apparatus is not completely unified on policy. It also indicates, at a minimum, that judges do not believe their personal safety is in jeopardy from challenging regime rules, and so may allow opponents to update their own assessments of the risks of challenge.

Third, a court decision raises the cost of repression and is a resource that can be used by activists to rally supporters to their cause. The court decision legitimates regime opposition and raises the costs of repression. A regime that arrests citizens after an unfavorable court decision will suffer greater reputational loss than it would before that decision. This is not to say that the court decision guarantees implementation—only that it can facilitate mobilization.

The incentives for courts to produce “trigger” decisions are not obvious *ex ante*. Courts have an institutional incentive in ensuring that their decisions are implemented rather than ignored, which requires predicting that citizens will actually respond to calls for change. Attempting to provide a focal point for regime opposition carries grave institutional risks in the event that the citizenry does not enforce the decision. The regime can respond in myriad ways to punish the courts. We should expect, then, that courts will engage in providing focal points only when they have strong institutional and political links to outside institutions that can defend them from punishment, or are sufficiently confident for other reasons that their decisions will be implemented. These conditions are not always present.

Gretchen Helmke's (2004) notion of "strategic defection" provides one set of conditions in which we might see the courts being willing to provide such focal points. Helmke focuses on highly unstable institutional environments (Argentina in particular), where new governments come in with some frequency and typically change the composition of the high courts when they do. In such places, argues Helmke, "the relevant inter-temporal conflict of interest shifts from the standard scenario of a judge appointed by a past government who is primarily constrained by a current government, to a more uncertain situation in which a judge appointed by the current government faces potential constraints at the hands of a future opposition government" (p.13). Under such circumstances, judges may start to rule against the current government as soon as it begins to weaken so as to preserve their position under a future regime. Judicial decisions in such circumstances provide information to the opposition about the imminence of decline, and thus can help to facilitate anti-regime coordination.

A dramatic moment in which courts appeared to play a triggering role occurred during the "Orange Revolution" in the Ukraine of 2004-2005. President Kuchma had sought to use his position to promote the candidacy of his chosen successor Viktor Yanukovych. Using a variety of methods, including seeking to poison the opposition candidate Viktor Yushchenko, the government rigged the results of a run-off election in November 2004. Yushchenko's supporters refused to accept the results, and he held a symbolic inauguration. He also gathered a set of resolutions from local governments promising support. His supporters initiated widespread protests and demonstrations, as well as a court case seeking to annul the election results. In addition, the parliament voted no confidence in Yanukovych, who was serving as prime minister. Dramatically, on

December 3, 2004, the Supreme Court resolved the immediate political deadlock when it ordered a re-vote for the presidential election later that month. Held under intense international scrutiny, Yushchenko won the second election handily and the court dismissed Yanukovych's various legal challenges. The court was thus at the center of forcing a change in power, providing the capstone to a broad movement and turning back continued dictatorship.

The decision served as a trigger because of its temporal proximity to broader efforts at social mobilization. The Ukrainian decision emboldened the opposition and buried the regime. The court did not pick the leader directly, but was involved in structuring political competition to ensure that the choice was made in a transparent manner, providing an opportunity for the opposition forces to exploit. This illustrates, again, one of the themes of how courts can assist with democratization: holding the regime to its nominal promises and providing fora for political forces to pursue their agendas.

In very rare cases, then, courts may make crucial decisions that turn out to be focal points for broader oppositional coalitions to mobilize. That is, court decisions can become the crucial moment at which regime change coalesces. But court decisions are neither necessary nor sufficient for democratic transition to occur. And a historical review suggests such moments do not often occur.

Downstream Guarantors

A more common scenario occurs when the authoritarian regime seeks to withdraw from active involvement in politics rather than maintain power indefinitely. This may be

typical of some coup-makers, or a regime which relied on a short-term emergency to justify repressive policies. It may also be a rational decision once a regime realizes it cannot survive. In such cases, the autocrat faces the problem of guaranteeing that his or her core policies will not be overturned after a transition back to majoritarian rule. The autocrat may also be concerned with the property and liberty of his supporters, who are likely threatened by a change in power.

In this type of situation, the autocrat may seek to empower courts to act as downstream guarantors of the bargain for exit, providing policy security after the dictator goes. Hirschl (2004) writing in the context of industrial democracies, calls this function “hegemonic preservation” in which a declining powerful group uses courts to secure its policies and limit downstream actors. My version of this argument (2003) focuses on minorities in general (which can include departing autocrats) and suggests that courts provide political insurance to prevent policy reversal and minimize the risks of the future. This should not strictly speaking be seen as an anti-democratic function—sometimes it can be necessary to induce the autocrat to give up power in the first place. But the court plays a basically conservative role of preserving a bargain against future disruption.

This scenario is only likely for certain kinds of transitions, typically gradual ones in which the autocrat is able to write the rules of the game and negotiate the terms of exit. Perhaps the paradigm example is modern day South Africa, in which the National Party negotiated an extensive set of judicially enforceable rights as a condition of turning over power to majoritarian institutions. Some accounts of Chile’s negotiated transition under Pinochet also appear to fit this account (but see further discussion below). The strategy of using courts to entrench policies is effective in a wide variety of settings, but there is also

no guarantee that it will be fully effective, particularly if courts are tainted as instruments of the earlier regime. The classic account of French judicial politics traces fear of *government du juges* back to the French revolution, in which the Magistrates served as a reactionary force and thus could not guarantee even their own heads. One can imagine, however, an alternative French history in which the judges induced the King to step down through guarantees that his property would remain intact. Whether the particular story here is credible or not, the basic point that judges can serve democracy by upholding the rights of the former dictators, because such institutional guarantees can induce resignation without revolution.

An example of courts serving as downstream guarantor comes from South Africa under the African National Congress (ANC). As Hirschl (2002; 2004) argues, there was a “near-miraculous conversion to constitutionalism and judicial review among South Africa’s white political and business elites during the late 1980s and early 1990s, when it became clear that the days of apartheid were numbered and an ANC-controlled government became inevitable.” For much of South Africa’s history, the white elites had opposed the creation of judicially created bills of rights. But when it became clear that the regime could not be maintained by repression, the regime shifted views and drafted its own version of a bill of rights. This was designed not only to preserve the rights of prospective minority in the face of near certain electoral loss (Ginsburg 2003) but also, crucially, to preserve the economic leverage of the elite. At the time of transition, the white minority had average incomes of eight times the black majority, and four conglomerates controlled 95% of productive capital (Hirschl 2002: 136). There would be inevitable pressures for redistribution after the new majority took over; drafting a new

constitution securing property rights, and establishing a court to monitor violations, was a way of entrenching the power and wealth of the old elite (as well as ensuring credibility for the new ANC majority).

The new Constitutional Court oversaw the transition, even demanding changes in the final draft constitution to meet the requirements of the Interim Constitution. To be sure, the Constitutional Court has played many other roles in democratic transition (Klug 2003), helping to define the new order and to incorporate global human rights discourse into the country. In this sense, it has also been a vehicle of democratic consolidation. But it would arguably not have been created without its ability to serve as a downstream guarantor of the bargain ending apartheid. The core elements of this bargain—democratic rule in exchange for security of property rights and limited transitional justice—have remained intact against great political pressure, and the country's courts have been part of the reason. This has led to criticisms, to be sure, but all in all has garnered respect for the Court.

Downstream Democratic Consolidators

In other times and places, courts may serve as instruments of the newly democratic regime, becoming central to the process *after* the crucial moment occurs. In these scenarios, the change from autocracy to democracy involves a removal of constraints on the legal system, or in some cases affirmative empowerment of legal actors. In these instances, the courts can become important sites of contestation between elements of the old regime and new, devices for facilitating transitional justice, allies of the new order, or systematic dismantlers of the legal infrastructure of the old regime. For

example, in post World War II Italy, the transition from fascism was ambiguous, in that the Italian position was that they had won the war and hence there was no push for a complete institutional overhaul. This left many of the old fascist statutes on the books (Volcansek 1994). It became the task of the Constitutional Court to work through challenges to these statutes one at a time, cleaning the legal system of its fascist legacy. The Court's role was essentially one of building up its own power through cleaning up the legacies of authoritarian rule. But the timing was one of follower rather than leader in democratization.

To state the matter this way is not to assert that judges and law are unimportant to transition. On the contrary, courts become crucial to structuring an environment of open political competition, free exchange of ideas and limited government. The legal system plays an essential role. It is only to point out that in most instances, legal actors are not at the very center of the transition decision, but rather are involved in the phase of consolidation.

Often (though not in the Italian case, since the Court was a new institution) this scenario results from a reinvention of the judicial role post democratization. Formerly quiescent institutions can become more powerful and capable should they choose to do so, and skillful judges can adjust to the new era. Furthermore, as judicial personnel change, they are likely to become more daring and to serve as the expression of a new era.²

² It is not surprising that the South African negotiations called on the creation of a *new* constitutional court, rather than relying on institutions affiliated with apartheid. But in general, new elites lack the breadth and depth of personnel to staff a full judiciary after transition, so that of necessity low level judicial staff may remain who have been appointed by the previous regime. This can have significant downstream effects at low levels of policy conflict, in which judges can hamper the new regime.

One area in which one sees particularly intense judicial involvement is criminal procedure, which constitutes the legal apparatus of social control. Democracies and dictatorships differ in their use of legal tools in this regard. Typically, judges have a much greater role in democracies than they do in dictatorships, in which prosecutors and police operate with less judicial scrutiny. Judges asserting the need for greater judicial oversight of criminal procedure are at once advancing their institutional self-interest while ensuring conformity of the new regime with international standards.

Another zone of frequent judicial activity in new democracies involves administrative law. In many authoritarian regimes, administrative law is relatively underdeveloped as a discipline on bureaucratic discretion. Because dictators have lots of other tools for controlling bureaucrats, they do not always need to rely on courts to do so. A typical configuration involves loosely drafted statutes, under which bureaucrats exercise a good deal of discretion, subject to political rather than legal oversight. When new democratic governments take over, they are frequently stuck with the bureaucrats appointed by the authoritarian regime, and may lack sufficient personnel with technical expertise capable of running the government. In such circumstances, it is imperative to find ways to control bureaucrats, and courts can play a useful role in this regard. We often see increase use of “delegation” doctrines, requiring a tight linkage between legislative command and bureaucratic action, in the early years of new democracy (see Ginsburg 2003, ch. 5 and 7).

Yet another “consolidation” function, quite particular to new democracies, involves dealing with the legacy of the past. Where the old forces are not totally defeated but retain a powerful position in politics, demands for transitional justice are likely to be

suppressed (and appropriately so, since pushing too hard can undo the democratic turn.) On the other hand, if the old forces are defeated, there will be significant demands for coming to terms with the past, and this frequently, though not always, involves the legal system.

There is a vast literature on lustration, judicial rehabilitation, truth commissions and retroactive justice. When courts and the legal process are involved, complex technical issues arise involving, *inter alia*, the proscription on *ex post facto* law, statutes of limitations, and command responsibility. Frequently the rule of law, as classically defined, suffers when courts ignore legal formalities to hold accountable elements from the past regime. Nevertheless, from a political rather than formalist perspective, such a role can be helpful in furthering democratic consolidation and legitimation of the new regime in the eyes of the victims of the past one.

Judicial Irrelevance

A fourth possibility can also be observed. This is where the courts, for whatever reason, remain on the sidelines without either supporting or hindering democratization. Hilbink's (2007) account of Chilean judges during and after the Pinochet dictatorship seems to fit this story. The courts in Chile had internalized an ideology of "apoliticism" along with a hierarchical, self-reproducing institutional structure rendered judges unequipped and disinclined to take stands in defense of liberal democratic principles before, during, and after the authoritarian interlude. Nor have courts been particularly effective enforcers of the policies put in place at the end of the Pinochet regime, failing to strike infringements on property rights as well (Couso 2003). This seems to be a case

where the courts were neither agents of the past, nor the future. To be sure, after two decades they began to play a role in transitional justice, indicting General Pinochet before his death in 2006, but overall, the story seems to be one of general irrelevance.

Summary

We have identified four different roles that courts can play in democratic transition. Sometimes they serve as agents of the past, policing a transition or even preserving policies of the authoritarian regime. Sometimes they act as agents of the future, helping to transform the political process and encouraging the consolidation of democracy. In some rare instances, courts themselves trigger the democratization process itself, encouraging mobilization and tipping the regime into transformation. Finally, courts can be simply marginal players who neither facilitate nor hinder a transition to democracy.

III. FOUR CASES

A. Impeachment in South Korea, 2004

In 1987, after 35 years of more or less continuous authoritarian rule by military strongmen, South Korea established its Sixth Republic. The immediate trigger had been large scale demonstrations on the streets of Seoul, in which a growing middle class had joined students and labor activists to force political liberalization. The military leader, Chun Doo-hwan, stepped down; his successor, Roh Tae Woo, negotiated a deal with the two leading opposition parties, led by Kim Young Sam and Kim Dae Jung. The three major forces negotiated a new Constitution establishing a democratic order.

The major issues in constitutional negotiation concerned elections and the role of the military. Relatively little thought was given to the new Constitutional Court. But in the years since its establishment in late 1988, the Court has become the embodiment of the new democratic constitutional order of Korea. The Constitutional Court is routinely called on to resolve major political conflicts and issues of social policy, and has rendered over 7000 decisions.³ Its achievements include a delicate navigation of issues of retroactive justice, a complete overhaul of the country's criminal procedure, the prompting of significant amendments to the National Security Act, and an important administrative law jurisprudence (see generally Ginsburg 2003, ch. 7; Cho 1997). It is a classic downstream consolidator.

I have argued elsewhere that the Court's powerful design, and its effective exercise of power, were facilitated by the fact that Korean politics were quite divided at the time of the constitutional founding (Ginsburg 2003). Three major political forces vied for power; they concluded a deal in which presidents would be elected for a single five year term. This maximized the chances that each of the major leaders (Roh Tae Woo, Kim Young Sam, and Kim Dae Jung) would get to hold office, and they proceeded to win the presidency in three successive cycles. But since no party could anticipate that it would be able to dominate the political system, each had an incentive to empower a constitutional court as well, to minimize the harm it might suffer while out of power, and allow for opportunities to challenge to legislation and government action.

An unanticipated by-product of this constitutional bargain was weakness in the major political institutions. Because presidents could not be re-elected, they were lame

³ Constitutional Court statistics, <http://www.ccourt.go.kr/home/english/statistics.jsp#>

ducks from almost the beginning of their terms. Furthermore, divided government was not uncommon, as the National Assembly was often controlled by coalitions of parties that did not include the president's party. Each of the three major political figures from 1987 ended their term in scandal and quite unpopular. In such a circumstance the Constitutional Court was seen as a relatively trustworthy institution and enjoyed a good deal of institutional capital. Other government institutions are not as respected, and there is even talk at the moment about the need for constitutional reform.

Still, the country has moved forward, and the society continued its rapid transformation into a major global economy. In December 2002, a major step in the country's democratic history came with the election of activist labor lawyer Roh Moo-hyun as President, the first person to hold that office after the three who had negotiated the 1987 constitution. Roh represented a new set of social forces. A farmer's son who had passed the country's notoriously difficult bar exam without a college degree, he represented meritocracy, liberal activism, and, as the first President born after World War II, generational change. This last point was significant: Roh and the younger generation had always been less warm toward the U.S. presence than had their seniors with memories of the Korean War. He promised closer relations with North Korea, labor reforms and economic justice.

Roh's ability to pursue this ambitious agenda, however, was complicated by the fact that his Millennium Democratic Party did not win a majority in the National Assembly. His position became even less tenable when the Party split as a result of generational tensions in September 2003, and a corruption scandal related to campaign contributions erupted that October. Roh's response to the allegations of campaign

finance violations was to announce that he would resign if it could be proved he had illicitly raised a tenth as much as the opposition, an apparent admission that he had in fact violated the rules. Roh then staked his future on a mid-term legislative election to be held in April 2004, but—in violation of South Korean law—appeared to campaign for his new Uri party by urging voters to support it. The majority in the National Assembly responded with a motion for impeachment which easily passed by the necessary 2/3 vote.⁴ Roh was charged with three counts: Disturbance of the Rule of Law, Corruption and Abuse of Power, and Maladministration.⁵

Under Korean law, Roh was suspended from office and Prime Minister Goh Kun assumed the duties of the President while the impeachment procedure played out. The impeachment was sent to the Constitutional Court for confirmation, as required under the Constitution.⁶ This was the first time any court in South Korea had been called on to pick a ruler or impeach one, and the Court held a series of trial-like hearings at which the issues were argued.

Surprisingly, Roh's approval rating skyrocketed in the wake of the impeachment, and his party received overwhelming support at the April 2004 polls, winning an absolute majority in the National Assembly with 152 out of 299 votes. It is speculative but generally believed that this indicator of the public's preferences influenced the court in its decision. On May 14, the Court rejected the impeachment motion.

⁴ For an excellent analysis, see Youngjae Lee, *Law, Politics and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective*. *American Journal of Comparative Law* 53: 403 (2005).

⁵ Lee, *supra* at 414.

⁶ Art. 112.

The constitution requires six of nine justices to uphold the impeachment. 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 from 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, said the Court. The Court further rejected some of the charges, namely those concerned with campaign contributions that took place before he took office.

The incident illustrates two themes in the study of judicial politics. Most obviously, the Court demonstrated great sensitivity to signals from the broader political environment. By splitting the difference in a manner that responded to recent signals from the electorate, the Court gave both sides what they wanted while avoiding a constitutional crisis. Second, and more importantly, was the subtle way in which the court aggrandized its own power in making the decision. By failing to simply confirm the National Assembly’s factual findings, the Court placed itself in the position of reviewing the *political* assessment of the impact that the removal of the President would have on Korean democracy. The Court established itself, and not the Assembly, as the final arbiter of whether removal was actually warranted. In this sense the Court ended up enhancing its ability to say what the law is, and did so in a manner that ensured it would be accepted by the majority of the public.

Roh's political redemption at the hands of the Court proved short-lived. In October, 2004, his ambitious plan to move the capital of the country from Seoul was rejected by the Court as a violation of an unwritten "customary constitution" of Korea. Roh's popularity continued to decline, and his other initiatives foundered. The Court, on the other hand, is consistently rated one of the most effective institutions by the Korean public. In a recent poll, for example, it received the highest rating of any government body (and just behind several large corporations) in terms of influence and trust.⁷

In considering this "moment" two themes jump out. First, the Court did seem to generate a kind of mediate solution by finding that Roh had both broken the law but also deserved to remain in power. This left him as a weakened President while enhancing the Court's status. The addition of a "political" criteria for determining impeachment cases means the Court will have the final word should similar cases arise in the future. Second, the Court seemed to clearly respond to electoral signals. The popular support Roh enjoyed as a result of the impeachment meant that removing him from office would provoke a major political crisis. The Court avoided this by listening to the electorate. It was not constraining the new rising forces on behalf of the old, as in the guarantor model.

B. Adjudicating the Election in Taiwan, 2004

Taiwan's remarkable transformation from Leninist party-state authoritarianism to multi-party democracy has been rightly celebrated as a central case in understanding the third wave of democracy. It also provides insights into the role that courts can play in democratic politics.

⁷ See, eg JoongAng Daily, July 3, 2007, available at <http://joongangdaily.joins.com/article/view.asp?aid=2877553>

As in many authoritarian regimes, courts did exist during the one-party period. Even though courts provided some outlet for contesting policies during the authoritarian period, they never challenged core policies of the regime, preferring to remain in a discrete zone of apoliticism (compare Toharia 1975; Hilbink 2007). The crucial decisions to embark on democratization were not taken in courtrooms. Rather they were taken in the backroom discussions in and after 1985, when President Chiang Ching-kuo decided to save the Kuomintang (KMT) regime by “returning power to the people.”

Only once the direction of democratization was absolutely clear did the courts begin to act, around 1989. Much attention has been given to a dramatic decision in the democratization process, Interpretation No. 261 of the Council of Grand Justices. In this case, the Council was called on to determine whether the “Old Thieves” (legislators who had been elected on mainland China some forty years previously) could be forced to retire in 1990. This was certainly a watershed moment, but as I explore at length elsewhere (Ginsburg 2003), the decision cannot be seen as having been *independently* determined by judges. Rather the Council served as part of Lee Teng-hui’s faction within the KMT, helping reform to proceed over the objections of an intra-party obstacle. Judges were not the triggers.

Once democratization occurred, however, the courts played an absolutely crucial role as consolidator. The Council of Grand Justices systematically removed many of the barriers to participation set up by the KMT, accelerating after the Council became majority Taiwan-born in 1994. The Court began a pattern of deciding cases against administrative agencies, using a non-delegation doctrine to require tighter links between a reinvigorated political process and administrative action. Leninist institutions that had

been used to ensure ideological conformity of teachers and the media were cast aside as unconstitutional. The Council also instituted a total reform of criminal procedure, ensuring that police and prosecutors were henceforth under greater judicial scrutiny. After the “Przeworski moment” occurred and the presidency of the country shifted to the opposition Democratic Progressive Party (DPP) with the election of Chen Shui-bian in 2000, a period of divided government ensued, with the Council playing a key mediating role.

The expanded role for courts came to a head in the heated presidential election of 2004. The incumbent was Chen, a former activist lawyer. Like Korea’s Roh Moo Hyun, he came from a poor background and was something of a political outsider; he had won election in 2000 with only 39% of the vote and, like Roh, he had to govern without control of the legislature. His first term was marked by significant controversy and ineffectiveness. Cornered, he began to play his only card, that of Taiwan independence, more frequently, provoking a severe Chinese response.

Facing an uphill battle for re-election in 2004, Chen managed to push through a referendum law in late 2003, providing that a “defensive referendum” could be called in a national emergency. Chen then invoked it to schedule a referendum for the same day of the presidential election. The referendum asked whether citizens wanted the government to negotiate a framework with the PRC for peace and stability, as well as whether the government should acquire advanced missile systems in the event that China did not withdraw its own missiles targeting Taiwan. Chen hoped this would energize his political base.

Still, Chen was in a very close contest; polls predicted he would lose the election. On March 19, 2004, the day before the election, Chen and his Vice-President Annette Lu were shot while riding in an open jeep in Tainan City. The next day, they were elected by the razor-thin margin of 30,000 votes out of nearly 13 million cast.⁸ The losing candidates, the ticket of Lien Chan of the KMT and Chairman James Soong of the People First Party (PFP), charged that the shooting had been staged to elicit sympathy, and filed a suit the next day in the Taiwan High court challenging the election for legal irregularities. The High Court began to hear the case, bifurcating the case into separate questions as to whether the election should be nullified and whether Chen and Lu should be granted status as electees.⁹ The political parties agreed to a recount under court auspices, beginning in early May.

Meanwhile, competing investigations were launched to examine the shooting incident. The Government set up its independent investigative committee in early July. The opposition-controlled legislature, however, thought this would not generate an accurate account, and passed a law on August 24 to set up a special 17-member “March 19 Shooting Truth-finding Commission.” The Commission members were to be nominated by political parties on the basis of proportional representation, and it was granted wide investigatory and prosecutorial powers.

After the legislature reconsidered and confirmed the Act at Government request, Chen was forced to promulgate the Law and set up the Commission. On September 15,

⁸ The referendum failed for lack of 50% of the electorate voting on it,

⁹ The High Court initially rejected the suit, as the election results had not been finalized by the electoral commission; two days later the results were certified and a recount began. The suit was refilled and hearings began.

2004, legislators from the Democratic Progressive Party and its allied party, the Taiwan Solidarity Union, requested the Council of Grand Justices to enjoin the Truth Commission Act and to provide an interpretation as to its constitutionality. This was pursuant to provisions allowing any group of one-third of legislators to challenge acts as unconstitutional, a mid-1990s reform.¹⁰ Hearings began in late October.

In early November, the Taiwan High Court rejected the lawsuit calling for nullification of the electee status of the President and Vice President. The Court found that the recount had upheld Chen's victory, this time by a margin of 25,563 votes. Although this was a smaller margin than the figure announced by the Central Election Commission in March, the difference was not of a magnitude to affect the outcome, said the Court.

All eyes then turned to the constitutional case. On December 15, 2004 the Council of Grand Justices issued Interpretation No. 585, holding unconstitutional parts of the "Special March 19 Shooting Truth-finding Commission Act." In particular, provisions granting the Commission the exclusive power to investigate the incident, and granting Commission members full prosecutorial powers, were seen to violate the constitutional separation of powers scheme.¹¹ Provisions setting aside the National Secrets Act and other generally applicable rules also did not pass constitutional muster. A provision purporting to allow the Commission to order a retrial of judicial resolution of the case was held to violate rule of law principles. In short, the legislature was limited in

¹⁰ This institution parallels that prompting the constitutionalization of political conflict in France, the 1974 amendments to allow legislative subgroups to challenge legislation for constitutionality.

¹¹ Interpretation 585, Sec. 5

its investigatory powers to those related to its own constitutional functions, and could not encroach on executive or judicial powers.

At the very end of 2004, the Taiwan High Court rejected the suit seeking to nullify the election results. The Executive investigation continued, eventually holding that the shooter was a disgruntled citizen who had suffered financial problems he attributed to Chen. The man had committed suicide shortly after the shooting, so no criminal prosecution went forward.

This series of cases placed the Taiwan courts at the very center of the political controversy surrounding the 2004 election. The courts ended up allowing Chen Shui-bian to retain office, a decision that was no doubt legally sound and also deferential to the public. As in South Korea, however, the decision did not prevent Chen's popularity from continuing to plummet. A series of scandals implicated his wife and son and the position sought to recall him. Chen emerged weakened.

The Council, however, continued to remain a popular branch. It has engaged in a continuing constitutional dialogue with the legislature over the "March 19 Shooting" Act, on the extent of legislative investigative powers. In September 2007, it issued Interpretation No. 633, finding an additional provision of the law to be unconstitutional: a Commission formed by the legislature, said the Council, could not impose fines on agencies, businesses, or individuals for failing to cooperate in the investigation, or borrow personnel from executive agencies without both the employees' and the agencies' consent. This elaborated on a provision in the earlier opinion.

As a matter of judicial strategy, the Taiwan court system acquitted itself well in this series of events. They broke up a "moment" into several discrete legal issues, to be

decided by different courts using different procedures. The Council of Grand Justices turned an egregiously unconstitutional statute into an ongoing opportunity for constitutional dialogue by framing the issue as the general scope of legislative powers to conduct investigations. A crisis was averted, judicial power enhanced, and consolidation was furthered. Like its counterpart in Korea, the Court was a consolidator.

C. Picking and Rejecting a Populist in Thailand, 2001 and 2008

Thailand's politics have been notoriously unstable. With, depending how one counts, eighteen constitutions since the establishment of the constitutional monarchy in 1932, the country has cycled between corrupt civilian governments and military coups. In 1991, one of the country's many coups had been triggered by intra-military factional politics.¹² Once in power, the new leaders began to engineer constitutional reform to maintain power, installing a military man as premier. Political parties protested, and large demonstrations developed on the streets of Bangkok in May of 1992, demanding constitutional reform and a return to democracy. These protests were met with violence by the military. The crisis was averted only when King Bhumibol Adulyadej, the country's long-ruling and widely respected monarch, remonstrated the military Prime Minister and the leader of civilian protests on television.

There followed an interim government of technocrats with some military representation, charged with overseeing the eventual return to democracy. Eventually a constitutional drafting commission was composed, consisting of widely respected academics as well as lawyers and other technocrats. The Thai Constitution of 1997 (B.E.

¹² The coup followed rare public criticism of western-style institutions by the King. Handley (2006: 337-39).

2540) was a watershed in Thai politics, marking the first time that a constitution was adopted with widespread public involvement. Despite the King's call for a short, simple constitution (Handley: 434) the final draft was formidable: 336 articles and 142 pages in English translation. The process was a model of public involvement and deliberation, with extensive consultations and education sessions. Huge public discussions with t-shirts (green for supporting the constitution, yellow for opposition) engendered public debate and discussion.

Many of the provisions of the 1997 document, such as the extensive list of rights, were fairly standard. The real innovations were political, and were characterized by some as revolutionary in character (Chambers 2002). Besides the democratically elected House of Representatives, there was a non-partisan Senate. The nominally apolitical Senate was a linchpin institution, because the body had a central role in appointing the various guardian institutions. The Constitution included a plethora of these: the Electoral Commission, Audit Commission, Human Rights Commission, Ombudsman, Supreme Court, Supreme Administrative Court, Constitutional Court and National Counter-Corruption Commission. These various bodies were constituted in a complex set of nested selection committees.

The Constitutional Court was a central institution in this scheme, as it was charged with policing the other independent bodies in addition to its role in interpreting the constitution and resolving jurisdictional disputes among governmental authorities.¹³ It

¹³ The Court was composed of a President and 14 judges appointed by the King on the advice of the Senate. It included five justices of the Supreme Court, two from the Supreme Administrative Court, five other lawyers and three persons with political science degrees. Nominations came from the selection committee, which included four deans of law and four of political science faculties, four MPs and the President of the Supreme Court. This committee nominated ten persons with law degrees and six with political science degrees to the senate, which elected them.

could confirm findings of and evaluate disclosures submitted to the National Counter-Corruption Commission (NCCC), review whether any appropriations bill would lead to involvement of an elected official in the expenditure of funds,¹⁴ determine whether an Emergency Decree is made in a real emergency,¹⁵ determine whether Election Commissioners should be disqualified,¹⁶ and decide whether political party regulations violate the Constitution or fundamental principles of Thai governance.¹⁷

The early years under the 1997 Constitution involved building the new institutions. Things began to change in January 2001, with the election bringing to power Thaksin Shinawatra, a billionaire-turned-politician. Described as Thailand's Berlusconi, Thaksin had little substantive policy platform other than populist promises of wealth for the countryside. Like his Italian counterpart, he had long been linked with corruption. In early 2001, while Thaksin was still running, he was found by the NCCC to have filed a false asset report. After Thaksin's Thai Rak Thai party subsequently won the elections, the Constitutional Court was put in a difficult position as it was called on to confirm the NCCC decision (in accordance with its constitutional responsibilities). In a divided decision that has been charitably described as confused, the Court found that the false report had not been filed deliberately, and thereby allowed Thaksin to take the post of Prime Minister. As in South Korea, the Thai Court seemed to respond to democratic signals and found that the violation, however serious, did not justify overturning the election.

¹⁴ Constitution of Thailand (1997), § 180.

¹⁵ Constitution of Thailand (1997), § 219.

¹⁶ Constitution of Thailand (1997), § 142 (referring to §§ 137 and 139).

¹⁷ Constitution of Thailand (1997), § 47 para. 3.

Thus began a long chapter that ultimately led to the Constitution's demise. Thaksin subsequently consolidated his hold on power, acquiring political parties by merger and acquisition. Gradually, he began to influence all the independent political institutions, including the very ones designed to oversee corruption and the Constitutional Court itself. He did this through a combination of appointments, intimidation and bribery, particularly easy when members of the independent monitoring institutions were underpaid. Eventually, they were unable to resist the overwhelming pressure of Thaksin. Those members that resisted were subjected not reappointed, and the independent NCCC, which refused to acquiesce to Thaksin's demands, was disbanded and new appointments left in limbo. In early 2005, Thaksin won re-election when his Thai Rak Thai Party captured an overwhelming majority of parliamentary seats, making it impossible for the opposition to mount a vote of no confidence.

Thaksin's rule included the disappearance of up to 3000 drug dealers, a highly popular program, as well as a confrontational attitude toward renewed Muslim insurrection in the South of the country. He also was accused by critics of over-riding the Constitution with a state of emergency in the South and weakening the independence of the media. But it was only when he passed a series of laws that allowed him to sell his company, Shin Corporation, to a Singapore entity in early 2006 for \$1.9 billion without paying taxes, did the middle class of Bangkok have the last straw. Protests ensued and Thaksin was investigated for corruption. Because the NCCC was not operative, the case went to the Constitutional Court. The Court's pro-Thaksin reputation seemed confirmed when it found that there was no justiciable case.

With no help from any political institutions, anti-Thaksin members of the public began to demonstrate in the streets, calling for his resignation or impeachment. Thaksin then dissolved parliament and called a snap election for April 2, 2006, but the opposition chose to boycott it, saying Thaksin should step down first. The election went ahead anyway. Thaksin's party won 80% of the seats, running unopposed in many districts. However, the election law required that any candidate running unopposed garner at least 20% of the vote in a district in order to win the seat (Ockey 2007). As many voters left their ballots blank in protest, Thaksin's candidates failed to capture the necessary 20% of votes in 38 districts, enough to provoke a constitutional crisis because the election did not elect a sufficient number of winners for the parliament to be seated. By-elections were required in 38 constituencies, but these too failed to produce a full slate of members of parliament. The Election Commission then set aside the whole election because of the irregularities, requiring a new election some months later. After meeting with the King, Thaksin announced he was stepping aside, but continued to serve in a caretaker capacity.

At this point, in late April, the King met with the leaders of the Constitutional, Supreme and Administrative Courts and publicly called for them to resolve the problem. This illustrates one of the dangers of courts being tasked with ancillary powers, namely that there will be significant pressure on them to use them. But it was unclear exactly what judicial resolution was possible, with demonstrators on the streets both in support of and against Thaksin.

The Constitutional Court responded by annulling the April 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 the Senate and other political institutions at a standstill, the appointment process could hardly operate. The Constitutional Court had failed to resolve the problem completely.

Still, there was light at the end of the tunnel. A vote in November was expected to produce valid election results at last.¹⁸ Thaksin then made a crucial error: he began to interfere with the military itself. Even though he was serving in a caretaker capacity, he attempted to promote his own cohorts in the military hierarchy, replacing those associated with Privy Councilor Prem Tinsulanonda, a retired general and former prime minister close to the King. This was too much. On September 19, 2006, General Sondhi Boonyaratkalin of the Thai military led a bloodless coup while Thaksin was in New York at the United Nations General Assembly. The next day, the self-proclaimed National Administrative Reform Council abolished the 1997 Constitution.

Significantly, in the Interim Constitution passed by the military, the Constitutional Court was disbanded, though many of the other guardian institutions were able to remain functioning. The power of judicial review was transferred to a new Constitutional Committee, consisting of the Chair of the Supreme Court and the Chair of the Administrative Court, along with five justices of the Supreme Court elected by their colleagues.¹⁹ No doubt this reflects disappointment in the Constitutional Court which had allowed Thaksin to take power in the first place and later seemed to serve his interests. The interim constitution also outlined a process for constitutional reform and, in August 2007, a referendum approved the country's eighteenth Constitution, bringing the first

¹⁸ Economist, Old Soldiers, Old Habits, Sept 23 2006 at 27.

¹⁹ Art 35.

chapter to a close.²⁰ When subsequent elections returned Thaksin's new party to power, even as he was in exile, a new round of electoral disputes broke out, requiring intervention by the Electoral Commission and new Constitutional Court. Competing street protests ensued. In September 2008, the Court was called on to decide if the new leader, Thaksin's hand-picked successor Prime Minister Samak Sundaravej, had to leave office because of a paid appearance on a television cooking show in violation of the constitution. Again faced with a de minimis legal violation, this time the Court sided against the electoral majority and in favor of the opposition, anti-Thaksin forces, who had supported the coup d'état.

The Thai story involves two "moments." In the first, the Court deferred to a democratic majority to allow Thaksin to take power despite his corruption. The court was playing the role of democratic consolidator, allowing a popular leader to take power. In contrast with the Taiwan and South Korean examples, the person who the court delivered power to was neither democratic nor ineffective. He methodically undermined the country's independent institutions, including the Constitutional Court itself, so that it was not in a position to deliver benefits to the opposition or Thaksin. However, the risk-taking that had earned Thaksin a fortune led him to step over the line, provoking demonstrations and political crisis. This led the King to call on the Constitutional Court to resolve the problem, but it was unable to, and disbanded after the 2006 coup.

The second moment took place in 2008 under the new constitution drafted under military rule. This time, the Court appears to be playing the role of downstream guarantor for the coup-makers and their political allies. It appears to be completely willing to

²⁰ Preamble

constrain the new forces around Thaksin. This case suggests a generalizable hypothesis: consolidator courts that are subjected to democratic reversal may play the more cautious role of guarantor in the next iteration of democracy.

D. Triggering Democracy in Pakistan, 2007?

Last year saw a fascinating drama involving the courts in Pakistan, where the regime of General Pervez Musharraf came to an end. In March of 2007, Musharraf attempted to suspend the Chief Justice of the Supreme Court, Iftikhar Mohammad Chaudhry for “abuse of power and nepotism.” Analysts tied the decision to Chaudhry’s resistance to the establishment of military rule in the restive Northwest Frontier Province and the willingness of courts to take cases involving disappearances effected by the military. The courts had gradually enhanced their power (Ghias 2008). The timing was also related to a series of cases in which Musharraf’s rule was challenged in courts. Pakistan’s courts have a long history of dealing with the legality of exceptional rule, generally being supportive but also trying to limit the temporal duration of states of emergency (Mahmud 1993; Newberg 1995.)

Justice Chaudhry responded by resisting the attack and framing it as directed against the judiciary as a whole (Sanchez Urribarri 2007). The attack prompted broad demonstrations from the bar, which took to the streets to protest the decision and was joined by a broad coalition of supporters of the civilian political parties. The legal complex was mobilized. The legal controversy ended in the courts, and featured the remarkable spectacle of the Supreme Court reinstating Chaudhry on the grounds that his dismissal violated the law. Pressure continued to build on Musharraf’s regime and he

was forced to allow former Prime Minister Benazir Bhutto to return to the country through a combination of judicial decision and pressure from his most important ally, the United States. The Supreme Court found that Ms Bhutto and Former Prime Minister Nawaz Sharif had, as citizens, an inalienable right to return to the country. Sharif, however, who had been in exile in Saudi Arabia after fleeing corruption charges, was not permitted to re-enter the country until mid-November.²¹

Musharraf then announced that he would run for office. This seemed a facial violation of the Constitution, which prohibits the President from holding any other position²² and requires military officers to take an oath not to engage in politics.²³ In late September, however, the Court surprised observers by holding that Musharraf himself could run for office, by a vote of 6-3. This decision prompted protests from the bar association. Without getting into the legal merits of the decision, the effect was certainly to signal to Musharraf that the court was not inexorably opposed to him. The Court appeared to be avoiding a crucial mistake of the Thai Court-consistently siding with only one side in a deeply divided political scene. The decision seemed to suggest that the role of the court was *not* to pick winners and losers, but to structure, to the extent possible, a fair contest for leadership of the country. Before Musharraf was re-elected by the Parliament, however, the Court announced that it would hear a new constitutional challenge and announce whether the election was valid after the fact. The Court re-asserted its role as the final arbiter.

²¹ Home and Away, *The Economist* September 15, 2007, at 31-33.

²² Constitution of Pakistan 1973, Art. 43.

²³ Constitution of Pakistan 1973, Art. 244; Third Schedule.

On November 3, 2007, before the Supreme Court could rule, Musharraf declared a state of emergency, and arrested thousands of activists, lawyers and political party workers. Taking a page from his American counterparts, he decried judicial activism and terrorism in the same breath. Bhutto and other political leaders were put under house arrest; a Provisional Constitutional Order (PCO) was issued prohibiting any court issuing an order against the President, Prime Minister or any person exercising powers under their authority. The PCO further put the Constitution in abeyance, saying that the country would be governed “as nearly as may be by the Constitution.”²⁴ Only the five Supreme Court justices who took an oath to uphold the PCO would be allowed to remain; the other 12 were placed under house arrest, along with a number of Provincial High Court Justices. Chaudhry called for resistance, from his house arrest (Ghias 2008).

Musharraf was eventually forced to resign his military post through the intervention of the United States. After Bhutto’s December assassination, elections returned a coalition of civilian parties into office. Despite campaigning on a promise to restore the judges to the Supreme Court, the civilians dithered, largely because of tensions between the judiciary and the PPP.

Pakistan’s moment may well be viewed by historians as having been at the very center of the return to democracy. But the drama reminds us that seeking a place in history is fraught with danger for courts as institutions. The court itself has suffered. Courts need allies, and sometimes from unexpected places. The domestic legal complex was not enough to mobilize to overthrow Musharraf, and outside intervention was the decisive factor in democratization. All that said, though, Pakistan seems to be a case of

²⁴ Provisional Constitutional Order No. 1 (2007) Art. 2.1.

an upstream trigger, and serves as somewhat of a caution to other courts considering this risky role.

IV. WHAT ROLE WHEN?

We observe three different roles in our four cases. Pakistan's Court acted as an upstream trigger, illustrating why such a role is rare. Taiwan and Korea's courts played a second-order role in consolidating democracy, initially blessing decisions taken elsewhere and then helping to balance among competing forces. Do the four cases tell us anything about the conditions under which we might see different roles being played, particularly in situations of picking leaders? I do not here seek to articulate a complete theory, and my sense is that individual trajectories will be determined in large part through the skill and choices of judges themselves, as well as the inclinations of other political actors. That is, there is a significant role for judicial agency in accounting for variation across cases. Nevertheless, I can offer some speculative thoughts.

A. The authoritarian legacy as enabling condition

One variable to consider is the status of courts in the authoritarian regime itself. The legacy of the authoritarian period is likely to shape the role courts play in any particular situation, and to shape the politics of judicial involvement. Courts are called upon to play a wide range of roles in dictatorships, and are not simply instruments of the regime (Ginsburg and Moustafa, 2008). One can even imagine an authoritarian regime in which the scope of legality is greater than it is in some democracies. Singapore is a good example: the country regularly receives top scores on rule of law surveys and has a high quality legal system, yet according to some cannot be called a democracy (Silverstein

2003; 2008). Democracies in which the governing elite is cohesive and the process of disciplining judges easy may exhibit less scope for judicial independence (Ramseyer and Rasmusen 2003).

Not every authoritarian regime empowers courts. But we should expect that when they do so, it will affect the role of courts in democratization. If courts are seen as mere instruments of the authoritarian regime, and have not built up a stock of legitimacy by playing important social functions, it is unlikely that they will be empowered in the post-authoritarian period. In such circumstances, we should expect to see the creation of new bodies, such as designated constitutional courts, to take on important functions in the democratic era, because old judges will not be trusted. On the other hand, if judges exercised genuine independence in the authoritarian period, they may retain autonomy and power in the democratic era.

A regime subtype particularly prone to using courts may be what Levitsky and Way (2002) call “competitive authoritarianism.” These are regimes that have formal democratic institutions, but also violate the rules so often that they cannot be characterized as meeting minimal standards of democracy. Competitive authoritarians allow elections but rig the rules, control the media, and utilize the state security apparatus to ensure that no effective challenge arises to their rule. Courts may exist in competitive authoritarian regimes but are unlikely to develop the capacity to truly constrain the regime on core issues. They may become one of the instruments of governance, used to marginalize political opponents and interfere with institutions that show a modicum of independence, so that the role of courts increases as democracy declines (Trochev 2004).

However, such courts may also have autonomy in some realms and may become a site of some substantive constraint on regimes. And in some circumstances they can act as a “double-edged sword” (Moustafa 2007). For even as they help authoritarians accomplish certain tasks, the courts also provide formally neutral venues, in which clever activists can use the law to advance claims, embarrass the government, and call attention to important issues, even if they lose the particular cases in question. This quality results from the institutional structure of courts as transparent fora that apply publicly available rules. Judges may serve the regime most of the time. But there is the possibility of providing some political benefits to the opposition, or at least failing to uphold regime policies. Even in Stalin’s USSR, judges would sometimes fail to fully implement laws they found excessive (Solomon 1996). In Brazil under dictatorship, ordinary courts had a role in security cases and acquitted an astonishingly high percentage of their defendants (averaging 55% over fifteen years) (Pereira 2005). Writing about Egypt, Moustafa (2007) describes how a court system that was empowered to promote economic development gradually began providing victories to civil society groups that challenged regime policies, prompting a crackdown from the government. This suggests that there are risks for the authoritarian ruler in empowering courts, and that under certain circumstances, courts can be a vehicle for pressures to liberalize, or even triggers.

In some cases, the benefits provided to the opposition may not be all that apparent at the time the decision is made. Nevertheless, by changing the structure of political competition and guaranteeing the state play by the nominal rules, they can provide downstream openings that can only be taken advantage of some years later. Minor rulings on jurisdiction and standing can help to encourage litigants to bring their cases to courts,

which then provide a means of publicizing regime policies. Even court cases that involve pure repression can become rallying cries for the opposition. In Taiwan, for example, the regime tried virtually the entire leadership of the nascent opposition in trials following the 1979 Kaohsiung Incident (Roy 2003). These trials had a galvanizing effect on Taiwanese opposition to the KMT even though all the defendants lost their cases.²⁵ Individual leaders gained notoriety and experience through the trials that became an asset some years later.

To summarize the argument so far, the position of the courts in the pre-democratic period is largely a product of decisions undertaken by the authoritarian regime. This provides the framework within which courts must operate during early phases of democratization. The key factors seem to be the extent to which courts are able to preserve a realm of independence, which in turn depends on how much the authoritarians need them to play crucial governance functions.

Some legacy of independence heightens the possibility that courts can play a role as a guarantor, consolidator or trigger, rather than simply sit on the sidelines. But which role? My sense is that the greater the role of courts in the authoritarian regime, the more likely they are to serve as guarantors or triggers. In apartheid South Africa, for example, the courts operated with a long tradition of strict positivism, applying the law neutrally notwithstanding its immoral character (Dyzenhaus 1991).²⁶ This stance no doubt served the institutional interest of the judiciary, and also made it a more trustworthy body for the

²⁵ Indeed, virtually the entire leadership of the current Democratic Progressive Party was involved as defendants or attorneys in those trials, including former president Chen, former vice president Lu, and former premiers Su and Frank Hsieh.

²⁶ This mattered during the authoritarian period, as certain crucial cases against ANC leaders ended in imprisonment rather than crude death sentences at the hands of state security personnel. This allowed them to survive to a democratic era.

National Party to play the role of downstream guarantor. Weak courts will be less likely to serve as credible guarantors of policies against downstream reversals. They may instead seek to expand their power in the democratic era by playing a consolidating role in the service of the new order.

On the other hand, a set of courts that is empowered is also more able to play the role of upstream trigger for the democratization process. Courts that are perceived as being independent are more likely to see demand for anti-regime decisions. Furthermore, in instances when regime change is frequent (as in Helmke's analysis of Argentina) the court may be eager to provide support to regime opponents to maximize their power in the next iteration of a repeated game.

Perhaps the most common configuration, however, is that of courts serving as downstream consolidators. In the context of picking leaders, a chief role is to induce players not to take extra-constitutional action. Facilitating constitutional dialogues that turn the issue from the immediate question of who governs into the institutional question of what the powers of the various bodies are is one such strategy, for it gives all sides a stake in the continuing existence of the constitutional order. In addition, such a move enhances judicial power by establishing the court as the final arbiter.

B. Timing

The strategic perspective sees courts as engaged in power games with other actors. Judicial-decisionmaking depends on key parameters such as what information is available to the court and its calculation of likely results. These parameters may be modeled using non-cooperative game theory (Staton 2008) but we proceed informally to

simply observe that the calculus may depend greatly on timing. How recently has democratization occurred? Is the probability of punishment by an erstwhile authoritarian decreasing? Is there momentum in the political system that suggests that a triggering decision might be effective? Has there already been a peaceful transfer of power? The general expectation is that the passage of time reduces the utility of the guarantor role and makes the role of consolidator more attractive and less costly. The decision of the courts in Chile to re-open amnesties after the Pinochet case in London suggests that they began to abandon their apoliticism and place a late-stage consolidation role. Such a role hardly required the courage that similar decisions in the early 1990s would have evidenced. The trigger role, it seems, is an endgame one, to be adopted only when it appears that the regime may be susceptible to judicial tipping.

C. Application to the Four Cases

Part III of this paper presented four crucial junctures at which courts were in a position to pick leaders. We observed two (and a half) cases of a court playing a consolidation-type role (Korea and Taiwan, with Thailand 1997-2006 also falling into this category), one case where the court served as a trigger (Pakistan) and one in which the Court appeared to be a guarantor (Thailand after the 2006 coup). There was, no doubt, an element of contingency in each of the cases. We now ask what generalizations are possible from the application of the general framework to these cases.

First, consider the authoritarian legacy. In our four cases, judiciaries in general had a relative degree of autonomy in the authoritarian period. All four countries had capitalist economies, which require a modicum of judicial independence. But two of our

courts, that in Korea and in Thailand 1997-2006, had not existed in the initial authoritarian period and were products of the new democratic constitutional scheme. Instead of giving constitutional jurisdiction to the ordinary supreme court, both new democracies created new courts. Neither new court played a role as a guarantor. In neither case, in other words, was judicial empowerment associated with hegemonic preservation (cf. Hirschl 2004). When presented with cases to choose leaders, both chose to issue majoritarian decisions that overlooked technical violations of the law to reflect recent electoral results.

The Thai case suggests that the role of timing may be particularly important. The court initially attempted to facilitate consolidation by allowing the newly minted majority of Thaksin Shinawatra to take over. It subsequently sought to balance various political forces and encourage constitutional dialogues. For reasons largely beyond the court's control, the country's political institutions gridlocked, and the court died in the 2006 coup. When the new constitutional court was established in 2007 it has played a more aggressive role in constraining elected institutions on behalf of the more conservative urban elite. The suggestion is that the proximity of the disbanding of the first court led the second court to be more cautious.

Pakistan's own long history of judges constraining power at the margin but giving sanction to states of emergency seems to have drawn to a close in the most recent iteration, as judges did not bless the state of emergency for Musharraf. As has been apparent in the discussion, the trigger role was risky, but ultimately successful.

Table 1: Decisions Choosing Leaders

	Taiwan 2004	Korea 2003	Pakistan 2007	Thailand 2001	Thailand 2008
Authoritarian Legacy of independence?	Somewhat	New court	Somewhat	New court	New court
Years since Democratization began	17	16	0	4	0.5
Role	<i>Consolidator</i>	<i>Consolidator</i>	<i>Trigger</i>	<i>Consolidator</i>	<i>Guarantor</i>

IV. CONCLUSION

This essay has provided a framework for thinking about the political role of courts and law in democratization, through the lens of four cases involving choosing leaders. These cases seem fraught with danger for courts, as they risk alienating major political forces, and a major technique of judicial craft, namely issuing mediate decisions, is not always available.

The cases indicate that successful approaches depend on the broader role of courts in the political system. In autocratic settings, courts may on occasion seek to trigger a democratic tipping, but this is a dangerous course that rarely succeeds. Once democracy is relatively entrenched, the successful courts combined sensitivity to majoritarian pressures, with an ability to transform the dispute from one about personnel into one of principle. Serving as an agent for one of the parties, as in the hegemonic preservation model and the Thai example, does not seem to be a successful strategy, at least not in a period of pressure on the constitutional bargain.

We have also suggested that the greater the role of law and courts in the previous regime, the more likely courts are to be called on to serve as downstream guarantors, and the more able they are to serve as upstream triggers. Which role they play, and at what

times, depends ultimately on the decisions of individual judges. The ultimate conclusion is a modest one: courts seem to play an important, but second-order, role in democratization.

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