Politicization of Constitutional Courts in Asia: Institutional Features, Contexts and Legitimacy

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A. Introduction

The global spread of judicial review has become a research focus among constitutional scholars.\(^1\) While institutional arrangements for judicial review vary, some Asian states have adopted the constitutional court model. Examples of the trend toward this model in Asia include the Constitutional Court of Taiwan (1947), the Constitutional Court of South Korea (1988), the Constitutional Tset of Mongolia (1992), the Constitutional Council of Cambodia (1993), the Constitutional Courts of Thailand (1997 and 2007), and the Constitutional Court of Indonesia (2003). These constitutional courts are often perceived as political courts or often politicized.

This paper will explore the degree of their politicization, the reasons for their politicization, and the legitimacy of the tendency for their politicization. It begins with an analysis of their politicization within their respective institutional designs finding that institutional designs do move these constitutional courts toward politicization with the expansion of their power and more dynamic power sharing in the appointment and review processes. It then investigates the contexts in which these constitutional courts were established and examines the contextual roots in the politicization of these courts. Finally, this paper analyzes the legitimacy of the politicization from the expectation of the society as well as the dialogue-advancing judicial strategies.

In this paper, politicization of the courts or political courts is analyzed from the following three perspectives. First, it indicates that the design of the courts reflects power allocation.\(^2\) Second, it means that the jurisdiction of the courts is expanded to include “matters of outright and outmost

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politicized inclinations of the constitutional courts in Asia, namely, the length of judicial terms, procedures for judicial appointments, expansion of judicial functions, and processes for judicial review that are more dynamic.

I. Term Length

All the constitutional courts in Asia adopt a termed system in contrast to a tenured one despite their variable term lengths. Length of the term however, is often seen as an important factor to both judicial independence and politicization of the judiciary. Usually a longer and non-renewable term length is perceived to allow the justices to avoid the political winds, and therefore, remain more independent and less politicized. The term lengths of constitutional justices in Asia are divided into three categories: (1) short and renewable terms, (2) long and non-renewable terms and (3) long and non-renewable but staggered terms.

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4 See e.g., Peretti, In Defense of a Political Court, 1999.
5 See Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases, 2003, 46-47. Whether life tenure or long, fixed and non-renewable term improves judicial independence more is controversial. Some scholars argue that life tenure system causes problems such as strategic retirements, incentives for young nominees and random distribution of appointments. See e.g., Ditullio and Schochet, “Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms,” 2004, 1094-1128.
6 It should be noticed that long and short terms here are used in a comparative sense.
1. Short and Renewable Terms

The constitutional courts in South Korea (established in 1989), Indonesia (established in 2003) and Mongolia (established in 1992) are all composed of nine justices that serve a short term of five or six years in comparison to other similar jurisdictions in Asia. The constitutional justices sit for six years in South Korea, five years in Indonesia, and six years in Mongolia. While these countries impose term limits, they do allow constitutional justices to be reappointed with restrictions. For example, Indonesia allows the judicial reappointment once, while South Korea and Mongolia have no term limits. As Tom Ginsburg pointed out, “Other things being equal, the possibility of reappointment has the potential to reduce judicial independence, as judges in their later term who seek to remain in office must be quite sensitive to the political interests of those bodies who will reappoint them.” Thus, it is reasonable to infer that constitutional justices in these three countries may have incentives to render decisions in line with political needs.

2. Long and Non-renewable Terms

The other three countries, Taiwan, Thailand, and Cambodia, utilize the long and non-renewable term arrangement. Taiwan’s 1947 Constitution did not address the number of justices or their length of term. In the Organization Act of the Judicial Yuan, Taiwan prescribed its court size (17 justices) and term length (9 years and renewable). In the 1997 Constitutional Amendments, however, the Constitution directly specify that the Judicial Yuan shall have 15 Grand Justices, and each Grand Justice shall serve a single non-renewable term of 8 years.

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8 See the Constitution of Republic of Korea, art. 112, para. 1, 1987.
9 See the Law on Constitutional Court, No.24/2003, art. 22.
10 See the Constitution of Mongolia, art. 65, sec. 1, 1992.
12 See the Organization Act of the Judicial Yuan, art. 3 & 5.
13 See the Additional Articles of the Constitution of the Republic of China, art. 5, 1997.
Unlike Taiwan, Thailand set its constitutional court composition through its Constitution. In the 1997 Constitution of Thailand, drafters set the composition at 15 judges. It then reduced this number to 9 judges in the 2007 Constitution of Thailand. Both Constitutions, however, retained limitations on the length of terms served by the judges to a single 9 year term. Like Thailand, Cambodia also set the number of its Constitutional Council at 9 and limited them to a 9 year term.\textsuperscript{14}

The primary advantage of adopting a long and non-renewable term scheme for constitutional court judges in these countries is its ability to insulate judges from the pressure of reappointment, and hence, they face less politicization.\textsuperscript{15} While it appears these schemes can reduce the impact of politicization, it remains uncertain whether constitutional courts in Asia are politicized more or less by the choice of a given term arrangement since there is an even split between the two arrangements. That is: three countries adopted a short and renewable term arrangement and three selected a long and non-renewable arrangement. Nevertheless, two observations are apparent from above-mentioned institutional arrangements. One is the original design for Taiwan was a scheme based on renewable terms that shifted to non-renewable terms after it experienced a democratic transition and the growth of an opposition party. The second one is at least half of the constitutional courts in Asia retain some form of term limitation arrangement that tends to respond to political influences. It seems that institutional measures in the term length of these Asian constitutional courts have been taken in responding to possible problem of politicization. Its function, however, remains to be seen.

\section*{II. Appointment Procedures}

Among the six constitutional courts court in Asia, the appointment procedures may be classified into four models: (1) cooperation, (2) representation, (3) staggered terms, and (4) dynamic power sharing. The cooperation and representation are two traditional models that are more widely discussed among constitutional scholars.\textsuperscript{16} The other two models, stagger-
red terms and the more dynamic power sharing, are recent paradigms that have received scant attention. Each of these models can affect the degree of politicization experience by judges in a constitution court system.

1. Cooperation Model

In the case of the cooperation model, it requires two governmental bodies to complete the appointment of constitutional justices.\(^{17}\) Usually the head of the executive, the president or the premier, nominates candidates for a constitutional justice position that are legislatively confirmed or approved. Legislative approval usually requires a majority (more than 1/2 the votes) or supermajority (more than 2/3 of votes) rule.\(^{18}\) This institutional design provides a check and balance for the different governmental bodies in the judicial appointment and confirmation process. It limits the politicization that may arise from the political interests of a political party holding a majority within the bodies responsible for the nomination and affirmation of these justices.

The oldest constitutional court in Asia, Taiwan’s Constitutional Court, adopts this model. According to the 1947 ROC Constitution, Grand Justices shall be nominated by the President with the consent of the Control Yuan by majority rule.\(^{19}\) During its democratization movement of the 1990s, the functions of the Control Yuan were limited and changed. Hence, the approval of constitutional justices was first transferred to the National Assembly and then to the Legislative Yuan in the 2000 Constitutional Amendments.\(^{20}\)

When the ruling party occupies both the executive and legislative branches, the cooperation model with simple majority voting rule in the legislative approval process may risk creating a de facto single-body appointment mechanism, where both the executive and legislature decide according to political party preferences. An excellent example of this situation is the Constitutional Court of Taiwan. Before the democratization movement in Taiwan, the ruling party, KMT, controlled

\(^{17}\) See Ginsburg, *Judicial Review in New Democracies*, p. 44.


\(^{19}\) See the Constitution of the Republic of China, art. 79, para. 2, 1947.

\(^{20}\) See the Additional Articles of the Constitution of the Republic of China, art. 5 para. 1, 2000.
both the presidency and the congress, which resulted in the cooperation appointment operating as a single-body appointment. But when there was a divided government in 2007 a reversed scenario occurred in the nomination and approval process. The only way to improve cooperation model is through the incorporation of procedural arrangements that lead to more deliberations in lieu of partisan fighting among those responsible for the process of appointing and affirming justices.

2. Representation Model

The majority of the Asian countries with constitutional courts, four out of six, adopted a representation model against the backdrop of democratic transition from late 1980s to early 2000s. Countries establishing this constitutional court mode include South Korea, Indonesia, Mongolia, and Cambodia. In these countries, the constitutional courts are composed of 9 justices with appoints divided proportionally in thirds, where the executive, legislative, and judicial branches each appointing one third of the justices.

The representation model is called as “monocratic” as a single political organ could decide the nomination unilaterally. The politicized inclinations of the representation model are manifested in two aspects as an obvious power sharing mechanism and a tendency to nominate justices who are loyal to the interests of the appointing organs. First, by allocating equally the numbers of appointees to the three departments, the representation model balances the power and interests of different branches. Second, without the approval of other government bodies, the appointing bodies have full discretion to select the appointees who act in accordance with their own interests.

21 See Ginsburg, Judicial Review in New Democracies, pp. 43-44.
22 See the Constitution of Mongolia, art. 65, sec. 1, 1992, the 1945 Constitution of the Republic of Indonesia, art. 24C (3), 2002, the Law on Constitutional Court, No.24/2003, art. 18, the Constitution of the Kingdom of Cambodia, art 137, para. 1, the Constitution of the Republic of Korea, art. 112, para. 2-3, 1987
3. Staggered Terms Model

In contrast to the above two models, one of the more interesting developments in appointment procedures in Asia is the use of staggered terms model in Taiwan and Cambodia. Staggered term means that the terms of justices expire in different years. As mentioned above, the 1997 Constitutional Amendment in Taiwan provides the numbers and term of Grand Justice. This new system also creates the potential for a more diverse arrangement of the terms for Grand Justices. First, the term of service of each Grand Justice is calculated independently. Second, the new system took effect in 2003 giving the President the power to appoint 8 justices that shall serve for four years and the remaining grand justices shall serve for eight years. The terms of constitutional justices have become staggered sinceafter. In Cambodia, the Constitutional Council is composed of 9 members whose term is limited to 9 years and one-third of its members shall be renewed every 3 years. Thus, Cambodia has a staggered term system for the members of the Constitutional Council who sit on the bench for a maximum of 9 years, and they shall not be reappointed after the nine-year term expires.

By opting for this staggered term arrangement, countries reduce the disproportionate role that luck plays in the selection of justices, and it brings a fairer distribution of appointments. This arrangement when observed from another perspective raises the possibility that more power sharing will occur by guaranteeing that each appointment body of different regimes has a chance to decide the composition of the constitutional courts. In other words, the staggered term arrangement provides a balance of appointment power during the regime change. In this sense, staggered terms are politicized.

4. Dynamic Power Sharing Model

Another model is illustrated by the Constitutional Court of Thailand that relies on a dynamic power sharing model in which a more functional and dynamic appointment procedure is in palce. Thailand’s Constitutional

24 See the Constitution of the Kingdom of Cambodia, art 137, para. 1.
Court is composed of 9 members. The King of Thailand appoints constitutional justices upon the advice of the Senate. His appointment, however, is only nominal because the true appointment power for these justices resides with other governmental bodies. Among the 9 justices appointed, the judiciary selects 5, and the Senate picks 4 from the list submitted by the Selection Committee for Judges of the Constitutional Courts. The Selection Committee consists of the President of the Supreme Court of Justice, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives and the President of a constitutional independent organ elected amongst Presidents of such independent organs. If the Senate does not approve the nominees on the list, it shall request the Selection Committee to reconsider and resubmit the list. The Selection Committee shall resubmit the list within 30 days. However, if the Selection Committee disagrees with the Senate’s decision and confirms its original list with unanimous resolution, it shall refer the list to the Senate for further appointment. In cases where the Selection Committee does not decide the nominees in the period prescribed, the judicial department shall take the duty.

In comparison to other models, the appointment procedure in Thailand is very complex. Four features account for this complexity. First, the role of the executive branch is very restricted, so it eliminates the interference and manipulation of the executive branch in the process. Second, the judiciary plays a significant role in the appointment procedure based on its presence on the Selection Committee. Third, the leader of the opposition party is included in the Selection Committee. Fourth, the Constitution also contains a backup mechanism in case of a deadlock. On the one hand, this model tries to insulate the force of the executive branch while it also creates a more dynamic power sharing mechanism among the forces of the judiciary, the ruling party, and the opposition party. This new model clearly illustrates that the appointment procedure of constitutional justices is inevitably a field of power sharing.

26 See the Constitution of the Kingdom of Thailand, sec. 204, para.1, 2007.
27 See the Constitution of the Kingdom of Thailand, sec. 204, 2007.
28 See the Constitution of the Kingdom of Thailand, sec. 206, para. 1 (b), 2007.
So far, these discussions support the notion that no matter what model of appointment procedures is adopted, the constituency of constitutional courts is inevitably decided by a power allocation mechanism. From a normative perspective, scholars have argued this mechanism is due to democratic responsiveness.\(^{31}\) This explanation does provide a normative basis, but we cannot ignore the message conveyed by the mechanism itself – power allocation and balance is significant to the constituency of the constitutional courts. These Asian cases demonstrate that the power allocation mechanisms have evolved into a more delicate design in order to prevent political deadlocks.

**III. Expansion of Functions**

In the beginning, the establishment of constitutional courts was designed to exercise the power of judicial review, which was a process born from the U.S. Supreme Court. However, constitutional courts, as a separate institution from the ordinary judicial system, have been authorized to perform functions other than judicial review. These ancillary powers expand the functions of these courts, and they constitute a significant feature of constitutional courts. Such a feature differentiates the functions of constitutional courts from their U.S. Supreme Court counterpart, and it also illustrates the judicialization of politics. Constitutional courts are easily involved in political conflicts due to these ancillary functions. A more thorough survey of the ancillary powers of constitutional courts globally has been performed.\(^{32}\) This section will analyze the expansion of the powers of Asian constitutional courts in a timeframe. It finds that these ancillary powers did not arise at the same time in Asian contexts.

The powers of Asian constitutional courts did not arise suddenly, instead they expanded slowly over time. Based on this observation, an argument can made that constitutional courts are more and more involved in political conflicts in Asian contexts. When looking at the rise of the power of Asian constitutional courts in terms of timeframe, three periods are to be observed – the period after World War II (WW II), the period of the 1980s and early 1990s, and the period of the late 1990s and 2000s. These periods coincide with three historical events that might affect the

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31 See e.g., Ferejohn, “Judicializing Politics, Politicizing Law,” p. 43.
establishment and reform of Asian constitutional courts, namely WW II, the third wave of democratization, and the Asian financial crisis. The powers of constitutional courts are categorized into these three periods by the time they were authorized to Asian constitutional courts.

1. Functions Arising after WW II

The first constitutional court in Asia was established by the 1947 ROC Constitution. It was designated to perform the function of judicial review, examining whether laws and regulations contravene the constitution ad hoc. This power is not unique since it was eventually granted to the other five constitutional courts in Asia, not in the same form or type. All 6 constitutional courts allow abstract review whereas South Korea provides its constitutional court the power of concrete review. Pre-promulgation constitutional review is performed by Thailand and Cambodia.

In addition, two other functions were granted to Taiwan’s Constitutional Court, the power to solve competence disputes and the power to render unified interpretation of laws and regulations. The former power is also authorized to the other constitutional courts while the latter is only granted to the Constitutional Court in Taiwan. This arrangement makes sense, because dispute resolution of government bodies is a natural extension of interpreting the constitution.

2. Functions Arising in the 1980s and Early 1990s

During the 1980s and early 1990s, South Korea, Mongolia and Cambodia established their functioning constitutional courts and Taiwan made some changes to the powers of its Constitutional Court by constitutional amendments during the democratic transition. Three ancillary powers emerged in Asian contexts during this period, and they include supervision by political parties, removal of public officers and proposal of legal norms.

Supervising political parties and reviewing the dissolution of political parties allows the constitutional court to probe into the activities and the interaction of political parties. In a polity where political party politics operate, supervision of other political parties is part of the political process.

33 See the Constitution of the Republic of China, art. 78.
and duty of a political party. The decision on whether the program or activities of a political party are in violation of the constitution shall be left to the people. Matters regarding political party supervision inevitably attain a high political profile. In Asia, political party supervision first emerged in South Korea and Taiwan followed by the constitutional courts in Thailand and Indonesia. At least one study shows that 28% of contemporary constitutions contain such a provision.\textsuperscript{34} Four of the 6 constitutional courts in Asia (67%) are authorized with this function explicitly by their constitutions, indicating that Asian constitutional courts are more politicized in this sense.

Another ancillary function emerging during this period in Asia is the power of these courts to decide the impeachment or removal of significant public officers, especially leaders such as the president and the vice president. Impeachment or removal of political leaders is not a purely legal matter, since it often generates serious political conflicts. This power first appeared in Taiwan, South Korea and Mongolia, and it is now practiced by Indonesia. Of the 6 constitutional courts in Asia, 4 (67%) perform this function, and this rate is, again, higher than that the one-third of the courts holding this power globally.\textsuperscript{35} Moreover, adjudication of the impeachment or removal of significant public officers is not restricted to the president and the vice president. In South Korea, for example, the Constitutional Court shall adjudicate on impeachment of President, Prime Minister, Members of the State Council or Ministers, Justices of the Constitutional Court, judges or Commissioners of the National Election Commission, and Chairman and Commissioners of the Board of Audit and Inspection.\textsuperscript{36} Thus, constitutional courts may have significant powers to affect their governments.

Granting the power to propose legislation explicitly to constitutional courts is rare in the constitutions of the world,\textsuperscript{37} not to mention the power to propose constitutional amendments. Such power turns constitutional courts into an active and positive lawmaker, blurring the line of the judiciary with the legislature and transforming constitutional courts into political actors. The Mongolian Constitutional Tset is explicitly granted the power to propose constitutional amendments,\textsuperscript{38} which demonstrates its

\textsuperscript{36} See the Constitutional Court Act of Korea, art. 48.
\textsuperscript{38} See the Constitution of Mongolia, art. 66, para 3.
high political profile. Likewise, the Thai Constitutional Court is allowed to propose legislations regarding not only its organization, but also its jurisdiction.\textsuperscript{39}

3. Functions Arising in the Late 1990s and 2000s

During the 1990s and 2000s, Thailand and Indonesia established their constitutional courts, and at the same time, four ancillary powers also emerged in Asian contexts. These four ancillary powers include (1) reviewing electoral disputes, (2) certifying emergence decrees, (3) reviewing treaties, and (4) reviewing the behaviors of senators.

Reviewing electoral disputes is the most common ancillary powers of constitutional courts. Among the constitutional courts worldwide, 55\% of them are granted this power.\textsuperscript{40} Electoral disputes, by nature, are legal issues that belong to the jurisdiction of ordinary courts. Some functions, such political party supervision, exemplify judicialization of politics. Granting the constitutional courts the power to review electoral disputes, however, turns issues of judicial nature into political one. Allocating certain significant electoral disputes under the jurisdiction of the constitutional courts changes the nature of electoral disputes, and hence, underscores the political inclination of constitutional courts. Examples of the power of constitutional courts to adjudicate electoral disputes are seen in Indonesia,\textsuperscript{41} Thailand,\textsuperscript{42} and Cambodia.\textsuperscript{43} The other three ancillary functions are only present in the Constitutional Court of Thailand.\textsuperscript{44} The low rate of these three powers within Asian constitutional courts conforms to global trends.\textsuperscript{45}

\textsuperscript{39} See the Constitution of the Kingdom of Thailand, sec. 139 (3) and sec. 142 (3), 2007.
\textsuperscript{41} See the Law on the Constitutional Court, No.24/2003, art. 71-74.
\textsuperscript{42} See the Constitution of the Kingdom of Thailand, sec. 91, 92, 182, 183, 233, 2007.
\textsuperscript{43} See the Law on the Organization and the Functioning of the Constitutional Council of Cambodia, art. 25. Although the Cambodian Constitutional Council was established in 1993, the power was not granted explicitly to it until the promulgation of the Law on the Organization and the Functioning of the Constitutional Council of Cambodia in 1998. Hence, the power of deciding electoral disputed appeared in Asian constitutional courts in the late 1990s.
\textsuperscript{44} See the Constitution of the Kingdom of Thailand, sec. 154 (1), sec. 168, para 6 and para. 7, sec. 185, para 3, 2007.
Based on the foregoing discussions, there are some key observations on the power expansion of constitutional courts in Asia. First, instead of appearing in a specific period, the types of power grew with time. Second, the youngest constitutional court, especially the one in Thailand, enjoys the most ancillary functions, making it lean toward becoming the guardian of political processes. Third, in comparison with the global trend, the constitutional courts in Asia tend to be involved political functions due to the expansion of their powers.

IV. Dynamic Review Process

Theoretically, the constitutional court shall have the final say with regard to matters within its jurisdictions. The only way to change constitutional adjudications is to amend the Constitution. Such a rule thumb, however, is broken by the Mongolia Constitutional Tset.

According to the Mongolian Constitution, a constitutional judgment or finding rendered by a panel composed of five justices shall become valid and binding with legislative approval. If the judgment or finding is disapproved by the legislative branch, the judgment or finding shall be reviewed by the full bench of the Constitutional Tset. Where the Constitutional Court renders a decision with supermajority, the decision takes effect immediately.\(^\text{46}\)

This dynamic review process allows the parliament and the constitutional court to share the power of constitutional review, probably a legacy of the socialist regime. It reduces the absolute authority of the Constitutional Tset, requiring the Constitutional Court to interact with the parliament and to take the opinions and reactions of the parliament into consideration. The Constitutional Tset is incorporated into the political process and shall be sensitive to the will of the political branches. The Constitutional Tset, in this sense, becomes more political by nature.

V. Increased Politicized Inclinations

This part analyzes the institutional designs of the constitutional courts in Asia from four dimensions: term, appointment, functions and review

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\(^{46}\) See the Constitution of Mongolia, art. 66, sec. 2, art. 66, sec. 3, art. 67, 1992; the Law on the Constitutional Tset, art.8, sec. 5, 1994.
procedure. The above discussion shows that the institutional designs of Asian constitutional courts are indeed politicalized. Moreover, the analysis of these experiences reveals that the politicized inclinations evolve and increase with time.

First is politicization in the sense of power allocation. The Thai case of a more dynamic appointment procedure and the Mongolian case of the balance of the constitutional court and the legislative indicates the power allocation both within the constitutional court and between the constitutional court and other branches become more subtle and delicate. Such development accentuates that constitutional courts are taken as both a political player and an institution where political forces struggle. Second, in the sense of dealing so called mega-politics, the Asian cases show that constitutional courts are becoming a guardian of the political process. Younger constitutional courts get involved in political conflicts more easily. Third, in the sense of making decisions based on political motivation, both the renewable term and the newly emerging staggered terms arrangement are likely to drive justices make political decisions.

This finding of the increased politicized inclinations with time further triggers an inquiry into why and how these Asian constitutional courts were founded which will be discussed in the next part.

C. Contexts

The 6 constitutional courts were not established in the same period and context. Taiwan’s Constitutional Court was established soon after the WW II, even earlier than the booming of the constitutional courts in Europe. The youngest, the Thai Constitutional Court, was established in 2007. This more than 60 years of Asian practice could be divided into three periods, namely before the global spread of constitutional courts, during the 1980s and 1990s and after the first financial crisis in Asia.

I. Before the Global Spread of Constitutional Courts: Political Power Bargaining and Distrust

The Republic of China (ROC) was founded in 1912, and the negotiation of its constitution started in the early 1930s, but the process was interrupted by the civil war. The constitutional making resumed in 1945 at the conclusion of the WW II. Various political parties made the constitution based
on the process of negotiation. During the negotiation, the two biggest parties, the Kuomintang (KMT) and the Communist Party were very distrustful of each other, and hence, Chun-Mai Chang, a member of a third party had to handle the drafting task. Chang drafted the constitution based on his understanding of the U.S. experience, where he incorporated judicial review into his consolidated constitutional draft. In the following enactment, the KMT tried to replace its own draft with Chang’s draft, to which the Communist Party and other parties strongly disagreed. Finally the ROC Constitution was enacted in 1946 based on Chang's draft.47

In the 1940s, when the ROC Constitution was in the making constitutional review was not a judicial mandate widely practiced or even discussed in Asia. Understandably, whether to establish a constitutional court and its function was not a focus in the negotiation. As a result, the 1947 ROC Constitution takes the cooperation model and only grants limited and traditional power to the Grand Justices. The term and other details were prescribed in later rules governing the operation of the Council of Grand Justices. It is reasonable to argue that the role and function of the ROC Constitutional Court were not clear when it was established. The political parties might take it as a decoration in building a constitutional state which belonged as part of the modernization project.48

II. Democratic Transition during the 1980s and 1990s: The Rise of Opposition Parties

In the 1980s and early 1990s, some Asian countries began their democratic transition with the third wave of democratization. In this period, three new constitutional courts were established in South Korea, Mongolia and Cambodia while some significant changes were made to the older Taiwan’s (ROC) Constitutional Courts. In contrast to the political bargaining after the war where political power was more distributed among the parties, the political conflicts in this period were featured by the rise of opposition parties and their resistance against authoritarian regimes. In the context of democratic transition, political parties were more aware of the institutional role of constitutional courts.

47 For the historical details, see Lin, “The Birth and Rebirth of the Judicial Review in Taiwan – Its Establishment, Empowerment, and Evolvement,” 2012, pp. 167-222.
Taiwan’s Constitutional Court built by the 1947 ROC Continuation in China did not become a full functioning institution until the democratization in the late 1980s. The 1992 Constitutional Amendments expanded the power of the Constitutional Court by granting the power to review the dissolution of political parties. In 1993, the law governing the procedures of the Constitutional Court was amended and renamed as the Constitution Interpretation Act. Four important institutional changes were made in the amendment: (1) lowering the voting threshold, (2) allowing the minority in the parliament to file petition, (3) allowing citizens to file petitions, and (4) making the review process more judicialized. In the 1997 Constitutional Amendments, further alterations were made that included changing of the term of Grand Justices to one term only and adopting the staggered term system was adopted.

In the 1980s, South Korea, which shared the common feature of successful economic development, began its democratization against the backdrop of military authoritarian rule. The Constitution was amended in tandem with democratization. The amended Constitution was the product of the negotiations between the military dictator and the opposition party. Actually, when the Constitutional Court established by the 1987 the South Korean Constitutional Court was not the first institution with judicial review power. There had been judicial review both in centralized and decentralized forms, but none had been effective.\(^49\)

In 1989, with the collapse the Soviet Union, calls for democratic reform also emerged in Mongolia. The reform towards a democratic constitution took place after the first democratic election, in which the ruling party, the Mongolian People’s Revolutionary Party (MPRP) swept the opposition party, the Mongolian Democratic Union in Ulaanbaatar (MDUU). The Constitution Drafting Commission under the Great Hural was established in after the 1990 national election. The Commission was composed of 20 members from various parties. The constitution-making in Mongolia was focused on the protection of human rights and the institutional design of the government system and the judiciary. In the process of constitution-making, there were lots of conflicts and compromises between the MPRP and the reforming parties. The first Constitutional Tset was established to

assure the proper application of the new constitution.\textsuperscript{50} The establishment process of the Mongolian Constitutional Tset indicates that the “courtness” of the Mongolian Constitutional Tset is quite thin. Its name, “Constitutional Tset”, echoes with the thin “courtness”. In Mongolian, “tset” means the umpire in the wrestling game. Therefore, the Constitutional Tset was expected to be a mediator among political branches, rather than a court which focuses on human right protection and application of the constitution.

With the decrease of the control of the Vietnamese Communist Party over Cambodia in the 1980s, Prime Minister \textit{Hun Sen} and Prince \textit{Sihanouk}, who represented two political forces, launched a series of negotiations regarding constitutional reform. The reform was closely connected with the Paris Agreement signed in 1991. The 1993 national election for the Constitutional Assembly was successful owing to the efforts of the UN Transitional Authority in Cambodia (UNTAC) established in the Paris Agreement. According to the Paris Agreement, the constitution shall be promulgated within three months of the election of the Constitutional Assembly. The Paris Agreement also provided that the essential elements of modern democratic constitutions, including rule of law, a bill of rights, democratic political processes and independent judiciary, shall be contained in the new Cambodian Constitution. Although the UN interfered with the reform in the first beginning, the international forces were excluded from the constitution-making process. The new constitution was passed under the secret negotiations between the winning party led by Prince \textit{Norodom Ranaridhh} and the Cambodian People’s Party led by \textit{Hun Sen}. The Cambodian Constitutional Council was established under the newly passed constitution. Basically it took the French model due to the French colonial background. However, the Cambodian Constitutional Council did not begin to operate until 1998.\textsuperscript{51}

\textbf{III. Responding to Government Failures in the Late 1990s and 2000s}

The third wave of Asian constitutional courts emerged after the first financial crisis in late 1990s and early 2000s. This period differentiated

\textsuperscript{50} For the details, see Ginsburg, “Distorting Democracy? The Constitutional Court of Mongolia,” 2003, pp. 161-166.

itself from the period of democratic transition, because of the features of globalization and governmental reform.\textsuperscript{52} In this period, the call for constitutional courts was not only to resist authoritarian regime, but also to respond to government failures for some major functions.

The Thai Constitutional Court was first established with the 1997 Thai Constitution, which has been labeled the People’s Constitution. This name reveals that the efforts of the citizens and public input created it. The driving force of the 1997 Constitution was the merchants and the middle class living in the urban area who were unsatisfied with the government’s inability and impotency in dealing the economic collapse in the middle of the 1990s. They called for a constitutional reform toward a government capable of responding the economic challenges brought by globalization. As a result, many independent institutions were designed by the 1997 Constitution to prevent the government from corruption. The Constitutional Court is one among a wide range of those “watchdog” institutions.\textsuperscript{53} The 1997 Constitution was turned into a failure because of the Taksin Regime. The 18th Constitution in 2007 was deemed as correction to the 1997 Constitution and the Taksin Regime.\textsuperscript{54} It was aimed to put more supervision on the political branches based on the failure of the 1997 Constitution. The Constitutional Court, not surprisingly, was enhanced and given more power to guard the political process.\textsuperscript{55}

Indonesia began its reform with the resignation of Suharto in 1998. The constitutional court was created in the 2001 Constitutional Amendments and started to operate in 2003. Similar to Thailand, Indonesia’s constitutional engineering was made under economic hardship due to the economic collapse in 1997. The constitutional reform was believed to provide the foundation of good governance and stable economy.\textsuperscript{56} The Indonesian Constitutional Court was established to assure that policies are made with accountability, to stabilize the operation of the government and to correct the wrongdoings of the government.

D. Legitimacy

The political nature of courts has been criticized both, from normative and positive perspectives. From the normative perspective, courts are perceived as lacking democratic legitimacy and the accountability of courts lies in application of law neutrally. Political courts, making political decisions rather than applying the law neutrally, are democratically not accountable. From the positive perspective, political courts are blamed for two reasons. First, politicization of courts, lacking of democratic legitimacy on the one hand and exposing the courts in political controversies on the other, diminishes the authority of the courts. Second, courts may be an efficient channel to resolve political conflicts or deadlock but courts might interrupt the dialogues of the civil society while giving a quick solution to political conflicts. As a result, political courts may be seen as not helpful, or even harmful, to democratic deliberation.

The politicization of the Constitutional courts in Asia bears strong contextual support. The legitimacy of the political constitutional courts in Asia could be well established as we look into the contextual backdrop of their creation and operation in Asia. The arguments are made from two dimensions: social expectation and judicial strategy. The former is about what role were constitutional courts expected to play. The latter is about whether and how these constitutional courts achieve the function expected. In Courts: A Comparative and Political Analysis, Martin Shapiro questions whether there is a prototype of courts and his answer is negative. He further points out courts are just like other political institutions and are given various political functions. In line with this analytical framework and observation, this paper argues that Asian constitutional courts are created and expected to be political courts and they fulfill their functions by advancing dialogues.

E. Conclusion

The analysis of the 6 constitutional courts in Asia correspond the global spread of judicial review in Asia, but also provide an institutional practice with the creation of a separate (constitutional) court in lieu of the normal court system such as that of Japanese Supreme Court. This separatist

practice, however, bears strong constitutional significance based on the foregoing analysis and comparison of the constitutional courts of the 6 countries. The most outstanding feature drawn from this analysis is the politicization of the courts.

While institutional arrangements vary among Asian constitutional courts, they are often perceived as political courts or often politicized. An investigation into the institutional design in terms of nomination and appointment, newly assigned functions and other institutional factors has revealed the built-in nature of political courts among these Asian practices. Institutional designs do move the courts toward politicization with the expansion of power and more dynamic power sharing in the appointment and review processes. This finding becomes more consolidated when considered the backdrops of creating these constitutional courts in three time frames. These constitutional courts were established with contextual roots of politicization, despite their divergent times and political-economical contexts. The legitimacy of the political courts in Asia could be drawn from the expectation of the society as well as the dialogue-advancing judicial strategy as practiced by not all but some Asian constitutional courts, such as that of Korea and Taiwan.

Works cited


