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The Emergence of East Asia Constitutionalism: Features in Comparison

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The Emergence of East Asia Constitutionalism: Features in Comparison

JIUNN-RONG **YEH**^{*} & WEN-CHEN **CHANG**^{**}

Abstract:

Vibrant constitutional democracies have taken hold in East Asian soil. Japan, South Korea and Taiwan come to mind as successful examples. Scant attention, however, has been placed upon the ways that constitutionalism has been brought into being and developed into distinctive forms in East Asia. This paper seeks to analyze in a descriptive way constitutional developments in Japan, South Korea and Taiwan. By studying the three jurisdictions together, this paper discerns a number of common features shared by constitutional developments in them, which include instrumental constitutional state building, textual and institutional continuity, reactive judicial review and a wide range of rights in tune with social and political progress. It contends further that these features developed in East Asian constitutionalism do not merely mirror standard (Western) constitutionalism nor are under shadow of Asian Values or merely in tandem with transitional constitutionalism. The full blossom of East Asian constitutionalism has shed a new light on contemporary constitutionalism and moved itself from periphery to the center of comparative constitutional studies.

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Introduction

Constitutionalism has swept the world by the end of the last twentieth century.¹ More than two-thirds of world populations live under constitutional democracies that observe to a certain extent human rights protection, rule of law, judicial review, limited government and separation of powers.² Moreover, constitutionalism has moved beyond traditional nation-state borders and developed into regional constitutionalism or constitutionalism in blocks.³ The efforts at making a European Constitution and the evolutionary process by which traditional European states have moved closer to one another in a constitutional sense illustrates this trend well.⁴ Even North American states including Canada, the United States and Mexico are gradually becoming a constitutional block by sharing common regulatory powers in a constitutional sense.⁵ An ever closer African Union, formerly the Organization of

- 1 For some descriptions of how constitutionalism has swept to the world, see generally Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991); Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992); Juan Linz & Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: John Hopkins University Press, 1996); Mary Kaldor & Ivan Vejvoda, eds., *Democratization in Central and Eastern Europe* (Continuum, 2002); Ian Jeffries, *The Countries of the Former Soviet Union at the Turn of the Twenty-first Century: the Baltic and European States in Transition* (New York: Routledge, 2004).
- 2 For the definition of constitutionalism, we adopt both procedural (institutional) and substantive aspects. See e.g., Louis Henkin, "A New Birth of Constitutionalism: Genetic Influence and Genetic Defects" in Michel Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994) 39; Nevil Johnson, "Constitutionalism: Procedural Limits and Political Ends" in Joachim Jens Hesse and Nevil Johnson, eds., *Constitutional Policy and Change in Europe* (Oxford University Press, 1995) 46.
- 3 We call this the rise of "transnational constitutionalism", see Jiunn-Rong Yeh & Wen-Chen Chang, "The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions" (2008) 27 Penn St. Int'l L. Rev. 89 [Yeh & Chang, "The Emergence"].
- 4 See EC, *The Treaty of Establishing a Constitution for Europe*, [2004] O.J. C 310/01. Although the signing of this treaty eventually failed, the process of making Europe a more consolidated Union has never ceased. see generally Larry Siedentop, *Democracy in Europe* (Allen Lane: 2000) at 215-31; J.H.H. Weiler, *The Constitution of Europe: "do the new clothes have an emperor" and other essays on European integration* (New York: Cambridge University Press, 1999); Erik Oddvar Eriksen & John Erik Fossum, "Conclusion: legitimation through deliberation" in Erik Oddvar Eriksen & John Erik Fossum, eds., *Democracy in the European Union: Integration through Deliberation?* (New York: Routledge, 2000) 256.
- 5 For how the North American Free Trade Agreement (NAFTA) would be seen as a kind of regional constitutional framework, see David Schneiderman, "Constitution or Model Treaty? Struggling over the Interpretive Authority of NAFTA" in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 294 (contending that there exists a constitutional mode for interpreting NAFTA).

African Union, was launched in 1999, and a constitutive act was passed in 2001.⁶

Against this backdrop of global constitutionalism, how are we going to assess constitutional developments in East Asia today? Are East Asian states also seen as functioning constitutional democracies? To what extent and in what ways are their constitutional functions characterized as the same or different from others particularly in the West? More importantly, with the rise of regional constitutionalism, is there any possibility for East Asia to emerge as a kind of regional constitutionalism or perhaps a kind of constitutionalism with East Asian features? If so, what would be possible features? To what extent would those features include so-called “Asian values”?⁷

Among East Asian states, Japan, South Korea and Taiwan stand as the most recognizable constitutional democracies. Japan was transformed into a peaceful, liberal constitutional democracy by the passing of the postwar Constitution in November 1946. Till this day, the Constitution has never been amended but nevertheless provided vibrant constitutional functions such as periodical parliamentary elections, change in governments and judicial review. The Supreme Court of Japan rendered only about a dozen rulings that denounced challenged government acts as unconstitutional and has thus been seen as conservative. Comparatively speaking, however, it is credited as a capable and independent court that even at times exhibits liberal and pluralist tendencies.⁸

South Korea undertook a successful democratization in 1987, leading to a largely revised Constitution and a new Constitutional Court. In the two decades after, government power have changed from the opposition and back, swinging among various political parties. Despite this, the performance of the South Korean Constitutional Court have perhaps been most credible. In decisions involving constitutionality of statutes and government actions, about a third are rulings that denounced their constitutionality.⁹

6 For its process and relevant texts, see “African Union in a Nutshell”, online: African Union <http://www.africa-union.org/About_AU/au_in_a_nutshell.htm>.

7 For a more thorough discussion on the Asian Values discourse, see *infra* notes 16-17, and accompanying text.

8 Yasuo Hasebe, “The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms” (2007) 5 Int’l J. Const. L. 296; Lawrence W. Beer & Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* (Seattle: University of Washington Press, 1996) at 49-54.

9 As of January 2009, the Court rendered 1,765 decisions on the constitutionality of statutes or government actions, of which 588 were ruled to be unconstitutional (319), unconformable to

Similarly Taiwan began an incremental democratization process since the late 1980s, and has since amended the 1947 Constitution that was originally adopted in mainland China seven times.¹⁰ The government power was peacefully changed to the opposition in 2000 and swung back again in 2008. The Constitutional Court of Taiwan, despite an old institution already established in 1948, began exhibiting judicial activism in the 1990s and reached a high peak on unconstitutional rulings of thirty to forty percent.¹¹

It is evident that the East Asian states of Japan, South Korea and Taiwan are functioning constitutional democracies. Scant attention, however, has been placed upon analyzing or theorizing their constitutional developments, particularly postwar experiences. Very rarely would comparative constitutional textbooks admit their constitutional developments or judicial decisions into leading case studies. Nevertheless, among the three, Japanese constitutional politics or decisions of the Japanese Supreme Court are discussed most.¹² Yet they are often being discussed as cultural variables to standard (namely, Western) cases or being referred as examples of constitutional practices in “exotic” places.¹³ As an attempt at filling in the scholarly vacuum, this paper seeks to analyze constitutional experiences of Japan, South Korea and Taiwan after World War II. By reading into their socio-political foundations for constitutional developments and featuring their distinctive natures, we hope to theorize what has been developed in constitutionalism among these East Asian states and perhaps speak for a new era when constitutional scholars in the West

Constitution (118) or unconstitutional in certain context (51). See Case Statistics of the Constitutional Court of Korea, online: Constitutional Court of Korea <http://english.court.go.kr/home/english/decisions/statistics/stat_eng.jsp>.

- 10 For a more detailed discussion of these constitutional revisions, see Jiunn-Rong Yeh, “Constitutional Reform and Democratization in Taiwan: 1945-2000” in Peter C.Y. Chow, ed., *Taiwan’s Modernization in Global Perspective* (Praeger, 2002) 47 (analyzing Taiwan’s dynamics of constitutional change over the last 55 years along the line of the national drive for modernization and political democratization).
- 11 Wen-Chen Chang, “The Role of Judicial Review in Consolidating Democracy: the Case of Taiwan” (2005) 2 Asia L. Rev. 73 [Chang, “The Role of Judicial Review”].
- 12 See e.g. Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999) (discussing some of the Japanese constitutional designs and cases but not those of South Korea and Taiwan); Edward McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (M. Nijhoff, 1986); Francois Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional Cases* (Cape Town: Juta & Co., 2000).
- 13 For example, in an earlier United States Supreme Court case, the Court named Imperial Japan as the last member in the civilized nations such that its legal customs were allowed to be taken into comparative judicial notice. See *The Paquete Habana*, 175 U.S. 677 (1900).

must turn their attentions to the East and reshape the dialogues between the two.

I. East Asia in Political and Constitutional Contexts

The development of legal scholarship on/about East Asia was primarily a response to the need of trade and investment from the West. With dramatic economic growth in the 1980s, East Asia has intrigued scholarly interests primarily concerned with economic and commercial laws.¹⁴ This body of scholarship has either dealt with technical legal issues facing economic trades in East Asia or elaborated with special attention to cultural variations in East Asian commercial laws. With the wave of regionalization around the world, discussions about the integration also spread to East Asia, but focused still primarily on economic aspects.¹⁵ Not until rapid social and political changes took place in the 1980s would scholarly attention shift to constitutional developments in East Asia.

A. “East Asia”: from economic growth to constitutional developments

Beginning in the late 1980s, rapid political transformations took place not only in East Asia but also around the globe. The developments towards liberal constitutional democracies in the region were hailed by scholars but faced strong criticism from authoritarian leaders. Perhaps most outspoken was ex-Prime Minister Lee Kuan Yew of Singapore.¹⁶ He openly argued against a wholesale import of democracy and

14 See e.g. William P. Alford, “How Theory Does – And Does Not – Matter: American Approaches To Intellectual Property Law In East Asia” (1994) 13 UCLA Pac. Basin L.J. 8; John O. Haley, “Competition Policy for East Asia” (2004) 3 Wash. U. Global Stud. L. Rev. 277; Chee Keong Low, “A Road Map for Corporate Governance in East Asia” (2004) 25 Nw. J. Int’l L. & Bus. 165; and Junji Nakagawa, “No More Negotiated Deals?: Settlement of Trade And Investment Disputes In East Asia” (2007) 10 J. Int’l Econ. L. 837.

15 Peter J. Katzenstein, “A World Of Regions: America, Europe, and East Asia” (1993) 1 Ind. J. Global Legal Stud. 65; Mary Y. Pierson, “East Asia-Regional Economic Integration Implications For The United States” (1004) 25 Law & Pol’y Int’l Bus. 1161; Won-Mog Choi, “Regional Economic Integration in East Asia: Prospect And Jurisprudence” (2003) 6 J. Int’l Econ. L. 49.

16 A transcript of interview with Lee, see Fareed Zakaria, “Culture Is Destiny: A Conversation with Lee Kuan Yew” (1994) 73:2 Foreign Aff. 109 at 111. Lee argues that the East places emphasis on “a well-ordered society”. Only with such a society will everyone have “maximum enjoyment of his freedoms”. Again, the argument seems to be that the West has its priorities reversed by not valuing social order over individual rights. For quotations and a concise review of Asian Value Debate, see Karen Engle, “Culture And Human Rights: The Asian Values Debate In Context” (2000) 32 N.Y.U. J. Int’l L. & Pol. 291. For the three essential characters of Asian Values, see Scott

human rights from the West. Despite political progress made in Japan, South Korea and Taiwan, Lee contended that human rights nurtured on Western soil were not applicable to the East. In response to such so-called “Asian values”, a number of scholarly works began describing “East Asia” or “Asia” as an analytical category that either exhibits a culture no different from any other in terms of capacities to reflect upon universal human rights values, or presents itself as a culture in which universal values are constantly debated and challenged by particular values or ways of lives due Asia's unique geographical, linguistic or ideological differences.¹⁷ Others joined the debate with a focus on Confucianism, a set of ancient teachings shared by East Asian states, primarily China, Taiwan, South Korea and Japan. They attempted to “discover” comparable liberal elements in Confucianism that may provide for solid foundations for receiving institutions and principles of modern liberal constitutional democracy.¹⁸ This body of scholarship, while addressing recent political developments in East Asia, tends to attach to a traditional view that “East Asia” belongs to such an exotic category that it may (or may not) be comparable to modern (Western) constitutional democracies.

Scholarship that examines vibrant constitutional developments in Japan, South Korea and Taiwan abound but tend to discuss respective constitutional experiences and avoid using “East Asia” as an analytical or discursive category. For instance, legal scholarship concerning recent Japanese constitutional developments covers a wide range of issues including judicial reform and the rule of law, indigenous rights and the

L. Goodroad, “The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, An Analysis of Singapore and Malaysia in the Global Order” (1998) 9 Ind. Int'l & Comp. L. Rev. 259 at 261.

17 See e.g. Michael C. Davis, “Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values” (1998) 11 Harv. Hum. Rts. J. 109 (arguing that the cultural relativist theories of the academy are tautological and overly deterministic because they fail to appreciate the roles of both human agency and institutions in the transformative processes of cultural discourse); and Karen Engle, *ibid.* at 293-94, argues that the assertion of “culture” is not a mere idea, but “a vocabulary” for contesting a certain type of hegemony, and the concept of “Asian values” can be used both for and against human rights.

18 See e.g. Victoria Tin-Bor Hui, “Toward A Confucian Multicultural Approach to A Liberal World Order: Insights from Historical East Asia” (2005) 99 Am. Soc'y Int'l L. Proc. 413 (stating that Confucianism contains liberal elements for both interstate and state-society relations; with a liberal tradition rooting in traditional Asian philosophy, East Asia can share peaceful transformation on sovereignty as Europe). See also Tom Ginsburg, “Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan” (2002) 27 Law & Soc. Inquiry 763 [Ginsburg, “Confucian Constitutionalism?”] (suggesting that “the institution of judicial review has some compatibilities with Confucian legal tradition, a point that has implications for how we think about institutional transfers across borders”).

peace clause.¹⁹ Similarly, the scholarship addressing constitutional issues of South Korea has explored issues such as constitutional revision, transitional justice, and freedom of expression, freedom of press, gender quality, and labor rights.²⁰ With regard to Taiwanese constitutional developments, the body of scholarship examines constitutional reform, judicial review, abortion right and privacy.²¹

The writing of this paper is to reject the above two tendencies. We attempt to address recent constitutional developments in Japan, South Korea and Taiwan as the category

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- 19 See e.g. Setsuo Miyazawa, "The Politics of Judicial Reform in Japan: The Rule of Law At Last?" (2001) 2 Asian-Pac. L. & Pol'y J. 89 at 89-121 (discussing the most recent changes in Japan's political environment that could radically alter judicial system and legal profession in the near future); Paul Lansing & Tamra Domeyer, "Japan's Attempt at Internationalization and Its Lack of Sensitivity to Minority Issues" (1991) 22 Cal. W. Int'l L.J. 135 (suggesting that when Japan attempts to contribute to the development of the international community, its minorities and oppressed groups are targeting the legal and regulatory system discriminating against them); Lawrence W. Beer, "Peace in Theory and Practice Under Article 9 of Japan's Constitution" (1998) 81 Marq. L. Rev. 815 (explaining why Japan became antimilitarist and how Japan's Constitution's "no war clause" has affected its law, policy and national attitude); Mark A. Chinen, "Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus" (2005) 27 Mich. J. Int'l L. 55 (examining the Japanese constitutional revision debates through the lens of recent scholarship on constitutional decision-making to see what lessons might be drawn about constitutionalism in Japan and elsewhere); Zachary D. Kaufman, "No Right to Fight: The Modern Implications of Japan's Pacifist Postwar Constitution" (2008) 33 Yale. J. Int'l L. 266 (suggesting that despite amending its constitution to confirm what many believe is already a reality to be Japan's remilitarization process, it still faces an increasingly suspicious and hostile environment internationally).
- 20 See e.g. Dae Kyu Kim, "Constitutional Amendment in Korea" (1988) 16 Korean J. Comp. L. 1 (addressing the actual process of South Korean constitutional amendment); Geoff Gentilucci, "Truth-telling and Accountability in Democratizations: the Cases Against Chile's Augusto Pinochet and South Korea's Chun Doo-Hwan and Roh Tae-Woo" (2005) 5 Conn. Pub. Int. L. J. 79 (demonstrating that a trial devoid of an accompanying and thorough truth-telling aspect is an inadequate means for instituting a transitional justice regime); Kyu Ho Youm, "Freedom of Expression and the Law: Rights and Responsibilities in South Korea" (2002) 38 Stan. J. Int'l L. 123 (arguing that South Korea not only enjoy freedom of expression, but also have a measures of responsibility to this right); Kyu Ho Youm, "Libel Laws and Freedom of Press: South Korea and Japan Reexamined" (1990) 8 B.U. Int'l L. J. 53, (reexamining the development of Korean and Japanese libel law in the context of press freedom); Rosa Kim, "The legacy of institutionalized gender inequality in South Korea: the Family Law" (1994) 14 B. C. Third World L. J. 145 (focusing on the evolving Korean family law and its inherent gender inequality); Richard Dicker, "South Korea Labor Rights violations under Democratic Rule" (1996) 14 UCLA Pac. Basin L. J. 196 (focusing on labor rights violations in South Korea from May 1994 through November 1995); and Laura Watson, "Labor Relations and the Law in South Korea" (1998) 7 Pac. Rim L. & Pol'y J. 229.
- 21 See e.g. Yeh, *supra* note 10; Piero Tozzi, "Constitutional Reform in Taiwan: Fulfilling a Chinese notion of Democratic Sovereignty" (1995) 64 Fordham L. Rev. 1193 (examining the democratization and constitutional reform on Taiwan in light of Chinese political tradition); David Sho-Chao Hung, "Abortion Rights in the United States and Taiwan" (2004) 4 Chi.-Kent J. Int'l & Comp. L. 1 (comparing abortion laws in the U.S. and Taiwan); and Shin-Yi Peng, "Privacy and the Construction of Legal Meaning in Taiwan" (2003) 37 Int'l Lawyer 1037 (attempting to construct a theoretical framework for understanding the social and legal meaning of privacy in a modern Chinese society).

of East Asia without any implicit or embedded doubts as to its comparability with modern (or Western) constitutionalism.²² We seek to put the three jurisdictions together and analyze – rather descriptively – what has been developed there. By reading into the three cases, we attempt to discern if there is any commonality among them and whether we may draw any theoretical implications from such commonality or differences.

B. Social and political foundations for East Asian constitutional developments

Before we examine more carefully features of constitutional developments in Japan, South Korea and Taiwan, we must look into their respective social and political foundations for constitutional developments. Admittedly, the three countries share comparable social foundations, thus providing them with fairly comparable preconditions for establishing constitutional democracies.

i. Sustained economy after rapid growth

Economic foundations for building constitutional democracies are comparably better in East Asia. Japan quickly recovered from World War II and moved rapidly up the economic ladder to advanced economies in the 1960s. With the economic boom in the 1970s and 80s, it has stood firmly among advanced countries despite a significant slowdown beginning in the 1990s.²³ Both South Korea and Taiwan were regarded as rapidly growing economies in the 1980s at the time of their respective radical political and social transformations. By the 1990s, South Korea found itself on the threshold of joining the club of advanced industrial nations in the world.²⁴ Taiwan also came up with steady economic growth despite rising competition with China.²⁵ It is fair to

22 The closest attempt may be an earlier effort of putting many constitutional systems of Asia together in a book by Lawrence Beer. See Lawrence Beer, *Constitutional Systems in late twentieth century Asia* (Seattle: University of Washington Press, 1991).

23 Dominic Kelly, *Japan and the Reconstruction of East Asia* (New York: Palgrave, 2002) at 89-105.

24 Chung-in Moon & Song-Min Kim, “Democracy and Economic Performance in South Korea” in Larry Diamond & Byung-Koon Kim, eds., *Consolidating Democracy in South Korea* (L. Rienner, 2000) 139; and John Kie-Chiang Oh, “The First Military Coup and Economic Growth” in *Korean Politics: The Quest for Democratization and Economic Development* (Cornell University Press, 1999).

25 Jong H. Park, “The East Asian Model of Economic Development and Developing Countries” (2002) 18:4 J. of Developing Societies 330.

conclude that vibrant economic developments in the three countries have provided comparably better conditions for their respective democratic and constitutional reforms.

ii. Open political environment with vibrant civil society

The three countries have by now functioning democracies with open and free elections. In Japan, despite the political dominance of the Liberal Democratic Party (LDP), various political forces have never ceased to challenge the dominance of the LDP and compete in major elections.²⁶ In the mid-1990s, the LDP lost its political dominance for the first time in decades, giving rise to a series of new political openings, the primary of which was the reform on electoral laws.²⁷ In 2007, the LDP alliance lost again in the election of the House of Councilors. Thus, contrary to the often mistaken view that Japanese politics is noncompetitive, we contend that political contestation in Japan remain as healthy as in other advanced democracies with likelihood of government transfers through elections.²⁸

Transiting from dictatorial regimes, South Korea and Taiwan began intensive democratization in the late 1987. In South Korea, a large constitutional revision was completed in 1987 and in 1993 the first civilian leader and a key figure from the past opposition, Kim Young Sam, was elected to the presidency.²⁹ Since then government power have passed between various political parties.³⁰ In Taiwan, there have been

26 The reasons why the two major oppositions, the Democratic Socialist Party and the Communist Party, have not had much success may come from electoral design as well as organizational skills particularly. See Stephen Johnson, *Opposition Politics in Japan: Strategies under a One-party Dominant Regime* (Routledge, 2000) at 175-80.

27 See *infra* notes 60-62 and accompanying text. See also Tom Ginsburg et al., “Judicial Review in New Democracies: Constitutional Courts in Asian Cases” (2008) 3:2 NTU L. Rev. 143 at 158-59.

28 The same standard introduced by Juan J. Linz & Alfred Stepan to evaluate consolidated democracies, see Juan J. Linz & Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe* (Baltimore: John Hopkins University Press, 1996) at 8-9 and 14.

29 Kim Young Sam, however, cooperated with the ruling party to beat another candidate, Kim Dae-Jung, also a leader from the opposition movement.

30 Configurations of political parties in South Korea are dynamic and fast changing in accordance with various political needs. For instance, ex-President Roh Tae Woo changed from Democratic Justice Party to Democratic Liberal Party in seeking collaboration with the opposition leader, Kim Young Sam. Kim Dae Jung, in an attempt at competing with Kim Young Sam, changed his party into New National Party and later changed again into New Millennium Democratic Party. Roh Moo Hyun, President between 2003 and 2008, also changed his party from New Millennium Democratic Party to Open Uri Party. See also Jong-sup Chong, “Political Power and Constitutionalism” in Dae-Kyu Yoon, ed., *Recent Transformation in Korea Law and Society* (Seoul

seven rounds of constitutional revisions since democratic liberalization.³¹ The first transfer of government power to the opposition occurred in 2000 and swung back to the past ruling party in 2008. By all standards, the two East Asian new democracies have exhibited political environments with open and stable political competition.³²

In addition to freely contested elections, a vibrant civil society that is capable of monitoring governments and generating political alternatives is also critical to democratic politics.³³ Civil societies in the three societies have met with such vibrancy and even played key roles in pushing social reforms preceding political reforms.³⁴ In both South Korea and Taiwan, professional organizations (typically lawyers) were involved in the many legislative reforms and constitutional litigation that catalyzed subsequent political changes.³⁵

iii. Stable social structure with family underpinnings

One of the most important social features shared by the three societies is perhaps the influence of Confucianism and its patriarchal teachings on family structures and society. The emphasis on family and its core functions to stable society has been said to lay down an important foundation for social stability and sometimes even economic success in East Asia.³⁶ At the same time, however, rapid industrialization and economic growth have posed great challenges to traditional families by encouraging

National University Press, 2000) at 11.

31 Yeh, *supra* note 10.

32 Linz & Stepan, *supra* note 28.

33 *Ibid.* at 9.

34 Kyoung-Ryung Seong, "Civil Society and Democratic Consolidation in South Korea: Great Achievements and Remaining problems" in Diamond & Kim, *supra* note 24, 87; Sunhyuk Kim, "Civil Society in democratizing Korea" in Samuel S. Kim, ed., *Korea's Democratization* (Cambridge: Cambridge University Press, 2003) 81; Iokibe Makoto, "Japan's Civil Society: An Historical Overview" in Yamamoto Tadashi, ed., *Deciding the Public Good: Governance and Civil Society in Japan* (Tokyo: Japan Center for International Exchange, 1999) 51; and Yamamoto Tadashi, "Emergence of Japan's Civil Society and Its Future Challenges" in Yamamoto (*ibid.*) 97.

35 See generally William P. Alford, ed., *Raising the Bar: The Emerging Legal Profession in East Asia* (Harvard East Asian Legal Studies, 2007). See also Chong, *supra* note 30 (describing the role of lawyers, prosecutors as well as law professors in South Korea's democratic transitions); and Jane Kaufman Winn, "The Role of Lawyers in Taiwan's Emerging Democracy" in Alford (*ibid.*) 356.

36 Koh Byong-ik, "Confucianism in Contemporary in Korea" in Wei-Ming Tu, ed., *Confucian Traditions in East Asian Modernity: Modern Education and Economic Culture in Japan and The Four Mini-Dragons* (Cambridge: Harvard University Press, 1996) 191; Kwang Kyu Lee, "Confucian Tradition in Contemporary Korea Family" in Walter H. Slote & George A. Devos, eds., *Confucianism and the Family* (Albany: State University of New York Press, 1998) 249.

workers to relocate from villages to metropolitan areas. A great deal of traditional families have been transformed into nuclear families where the relationships amongst family members have reshaped.³⁷ Gender equality and the relationship between parents and the child are two areas witnessing the most profound changes.³⁸ Rather than identifying themselves as members of clans or traditional families, people from the three societies gradually tend to identify themselves as individuals. This gradual transformation has in one sense made the reception of democratic constitutionalism that centers on individual rights easier but in quite another way complicated or perhaps even radicalized the idea of individuals and their relationship with others, particularly family members. In the following section, we shall see that the three courts have been trying to tackle these rapidly changing social relationships and norms with the developing concept of rights in their respective societies.

iv. Ethnic homogeneity despite local divides

Japan, South Korea and Taiwan are regarded as largely homogenous in terms of ethnic structure, which provided a good foundation for developing democracy.³⁹ Ethnically homogenous notwithstanding, strong local divides persisted in the three societies and exerted significant impact on national constitutional developments. Among the three, Taiwan has been identified as more divided than Japan and South Korea.⁴⁰ In Taiwan, the political divide between mainlanders who came to Taiwan from China after World War II and aboriginal Taiwanese impacted electoral results and competition between political parties intensively. The voting preference of mainlanders and their descendants persists to be for the past ruling party which enjoys

37 Arland Thornton & Thomas E. Fricke, "Social Change and Family: Comparative Perspectives from the West, China and South Asia" (1987) 2:4 Sociology Forum 746.

38 Takie Sugiyama Lebra, "Confucian Gender Role and Personal Fulfillment for Japanese Women" in Slote & Devos, *ibid.*, 209; Haejoang Cho, "Male Dominance and Mother Power: The Two Sides of Confucian Patriarchy in Korea" in Slote & Devos, *ibid.*, 187; Chin-Chin Yi & Bernhard Nauck, "Gender, Marriage and Family Support in East Asian Families" (2006) 54:2 Current Sociology 155; Ronald R. Rindfus, Minja Kim Choe, Larry L. Bumpass & Noriko O. Tsuya, "Social Networks and Family Change in Japan" (2004) 69 Am. Soc. Rev. 838; Shunichi Inoue, "Family formation in Japan, South Korea, and the United States: an overview" in Karen Oppenheim Mason, Noriko O. Tsuya & Minja Kim Choe, eds., *The changing family in comparative perspective: Asia and the United States* (Honolulu: East-West Center, 1998) 19.

39 Benjamin Reilly, *Democracy and Diversity: Political Engineering in the Asia-Pacific* (Oxford: Oxford University Press, 2006) at 37, 57-58.

40 *Ibid.* at 63.

closer ties with China while local Taiwanese may divert their votes for other parties.⁴¹

In South Korea, regional and local differences are strong and influence electoral politics regardless of differences in political parties and ideologies.⁴² A popular president could only earn a tiny portion of votes outside the region of his hometown.⁴³ Regionalism has not faded with democratic progress but even strengthened after rounds of intensifying elections.⁴⁴ The attempt at manipulating regional sentiments for political advantages has never ceased, but at the same time the call for electoral reform in redistricting remains strong. The struggle went quite expectedly into the docket of the South Korean Constitutional Court, which has always responded with a strong insistence on the equality of numerical representation and admitted no disparity beyond one-third.⁴⁵

II. East Asian Constitutionalism in the Shaping: Distinctive Features

Post-war constitutional developments in Japan, South Korea and Taiwan, notwithstanding differences, have exhibited important common features that must not escape from scholarly attention. These shared features as we identify include instrumental constitutional state building, textual and institutional continuity, reactive but cautioned judicial review and a wide range of rights in tune with social and political progress.

A. Constitutional- state building as part of a modernization

41 Cheng-yi Lin & Wen-Cheng Lin, “Democracy, Divided National Identity and Taiwan’s National Security” (2005) 1:2 Taiwan J. Democracy 69.

42 See e.g. David C. Kang, “Regional Politics and Democratic Consolidation in Korea” in Samuel S. Kim, *supra* note 34, 161; Chung-Si Ahn, “Transformation of South Korea Politics and Prospects for Democratic Consolidation” in Chung Si-Ahn & Chon-Pyo Lee, eds., *Politics and Economy of Regime Transformations* (Seoul National University Press, 1999) 23.

43 Yusaku Horiuchi & Seungjoo Lee, “The Presidency, Regionalism, and Distributive Politics in South Korea” (2008) 41:6 Comp. Pol. Stud. 861.

44 Horiuchi & Lee, *ibid.*

45 *Excessive Electoral District Population Disparity Case* (27 December 1995), 7-2 Korean Const. C.R. 760 (rendering that disparity cannot constitutionally exceed more than four times); *National Assembly Election Redistricting Plan Case* (25 October 2001), 13-2 Korean Const. C.R. 502 (rendering that disparity cannot exceed beyond one third). For the text of decisions in English, see <http://english.ccourt.go.kr/>.

project

The first feature in constitutional developments of Japan, South Korea and Taiwan is that the building of a constitutional state together with a legal system was undertaken as an inevitable part of modernization.⁴⁶ When the construction of a constitutional state is part of or merely a facet of a larger material project, it may easily become instrumental and run a huge risk of being manipulated or suspended for some “greater” (often materialistic) goal. The constitution would not be seen nor treated as the people’s self conscious efforts at self-liberalization – securing their own rights and freedoms and constraining state powers. It often takes years, if not decades, of liberalization and democratization movements for such a decorative or nominal constitutional regime to transform into a real functioning constitutional democracy. More often than not, however, such paper constitutions would be buried long before any ingenious democratization attempt would occur.

In Japan, the Meiji Constitution was enacted in 1889 with a clear intention to strengthen the prosperity, powers and progress of Imperial Japan.⁴⁷ Not much of any enlightenment or people’s self-pursuit in liberalization was ever mentioned in the constitutional document.⁴⁸ After World War II, the Constitution was primarily enacted under foreign pressure, and its first draft was even written by General MacArthur’s legal team in two weeks.⁴⁹ In order to preserve the integrity of the

46 See e.g. Lawrence W. Beer & John M. Maki, “*From Imperial Myth to Democracy: Japan’s Two Constitutions, 1889-2002* (University Press of Colorado, 2002) at 7-21 (describing the making of the Meiji Constitution as part of the project of building a modern nation-state as well as industrial modernization); Marie Seong-Hak Kim, “Customary Law and Colonial Jurisprudence in Korea” (2009) 57 Am. J. Comp. L. 205 (stating that western legal system including the constitution was introduced to Korea with specific aim of modernization); Herbert H.P. Ma, “The Chinese Concept of the Individual and the Reception of Foreign Law” (1995) 9 J. Chinese L. 207 at 214 (stating that constitution-making was undertaken as part of modernization in China in the late nineteenth twentieth century).

47 Beer & Maki, *ibid.*

48 The English text of the Meiji Constitution in Hirobumi Ito, *Commentaries on the constitution of the empire of Japan*, trans. by Miyoji Ito (Tokyo: Igirisu-horitsu gakko, 1889). A scan may be found at online: Hanover Historical Texts Project, <<http://history.hanover.edu/texts/1889con.html>>.

49 Wen-Chen Chang, “East Asian Foundations for Constitutionalism: Three Models Reconstructed” (2008) 3:2 NTU L. Rev. 111 [Chang, “East Asian Foundations”] at 116-19. For other discussions on Japanese constitution-making, see Katsutoshi Takami, “From Divine Legitimacy to the Myth of Consensus: The Emperor System and Popular Sovereignty” in Yoichi Higuchi, ed., *Five Decades of Constitutionalism in Japanese Society* (University of Tokyo Press, 2001) 9 at 12-17. See also Koseki Shoichi, *The Birth of Japan’s Postwar Constitution*, ed. & trans. by Ray A. Moore (Denver: Westview Press, 1997); Theodore McNelly, *The Origins of Japan’s Democratic Constitution* (University Press of America, 2000) at 98-100.

Japanese Emperor, the postwar government conceded to accepting renunciation of imperial sovereignty, implementing democratic governance and the peace clause.⁵⁰ While there were still some genuine local efforts at constitutional reforms from civil and lawyers groups,⁵¹ the lack of a people's democratic initiative was evident, and the Constitution was hardly an inspirational document that triggered serious guardianship. It was thus no surprise that conservative political camps already contemplated constitutional revision in the 1950s and never ceased to make attempts at amending the Constitution, particularly regarding the peace clause. At the same time, however, civic groups and liberal intellectuals, many of which had made efforts at participating discussions in postwar constitution-making, persisted to defend democratic values of the current Constitution and vowed against any attempts at constitutional revisions.⁵²

The postwar Constitution in South Korea shares much of the above story in that the Constitution was made very quickly and aimed at primarily declaring independence and assuring national sovereignty after decades of Japanese colonization.⁵³ The first Constitution was made to declare its independence in 1919 as Imperial Japan began to annex the Peninsula as its colony. The second opportunity to make a constitution was after World War II when the Japanese surrendered. However political relations between North and South Korea collapsed, and both made a respective Constitution to declare the Korean independence and pronounced the sovereignty of the entire Peninsula to belong to one Korea.⁵⁴ Thus, constitution-making in Korea (both South Korea and North Korea) was tainted with the strong nationalistic sentiment of anti-colonialism. The undertaking of establishing a constitution as well as a constitutional state was treated rather instrumentally to allow a national people (the Koreans) to be free from the previous foreign colonial power (Japan). When the purpose of writing the Constitution was primarily to obtain a symbol for national independence, its contents and functions became much less a concern. In the years

50 Article 9 of the Japanese Constitution. For an English translation, see online: International Constitutional Law <http://servat.unibe.ch/icl/ja00000_.html>.

51 Chang, "East Asian Foundations", *supra* note 49, at 130. See also Shoichi, *ibid.*

52 Shoichi, *ibid.* See also Yoichi Higuchi, "The Paradox of Constitutional Revision in Postwar Japan" in Yoichi Higuchi, *ibid.*, at 351-55.

53 Chang, "East Asian Foundations", *ibid.*, at 119-21.

54 *Ibid.* See also Kyong Whan Ahn, "The Influence of American Constitutionalism on South Korea" (1997) 22 S. Ill. U.L.J. 71 at 72; and Howard S. Levie, "How It All Started-and How It Ended: A Legal Study of the Korean War" (2002) 35 Akron L. Rev. 205 at 206 (quoting the Cairo Declaration and the General Order by the U.S. Secretary of War, in the United States and Korean Problem, S. Doc. No. 83-74).

following the Korean War, military governments succeeded each other. They either revised the Constitution or replaced it with a new one, but in either way, the text of the Constitution stayed pretty much the same and never received any serious attention.⁵⁵ The Constitution was taken only at face value and the act of making or revising it merely indicated the transfer of political power. Only after the democratization of 1987 would the genuine spirit of the Constitution – as a people’s collective decision in securing their own rights and constraining political powers– began to take hold.

Taiwan’s modernization came with Japanese colonial governance in 1895. The debate as to whether the Meiji Constitution would apply to colonial Taiwan exhibited evidently the instrumental value of the Constitution as governing tools over its subjects.⁵⁶ After Japan surrendered in the end of World War II, it was directed by the Allies to surrender its forces in Taiwan to Chiang Kai-Shek. Chiang’s troop swiftly seized the island and renamed it as the “Taiwan Province” of the Republic of China (ROC) represented by the Kuomintang (Nationalist Party, or the KMT) government. Around the same time, the Constituent Assembly drafting the ROC Constitution was about to resume the work that had been disrupted by the war. Notwithstanding strong disapproval particularly from Governor-General Chen Yi of Taiwan, the newly included Province was allowed to send delegates to participate in the making of the ROC Constitution. As neither the Taiwanese people nor the delegates were provided with information and time for the discussions on the draft Constitution, the presence of the Taiwanese delegates in the Constituent Assembly – seventeen out of fifteen hundreds – was largely symbolic and instrumental. This was further evidenced in the decision not to apply the new Constitution to Taiwan due to its former colony status.⁵⁷ On the Chinese mainland, the making of the Constitution was taken instrumentally to compete with western advancement as well as to consolidate the Chinese sovereignty that had been only loosely defined by the concept of the dynasty.⁵⁸ Perhaps even

55 Thus far, South Korea has had six republics, and has done major constitutional revisions or made a new constitution more than six times. But these constitutional changes did not give rise to major institutional changes, except the last constitutional revision in 1987 where the current sixth Republic was born.

56 Chang, “East Asian Foundations”, *supra* note 49, at 121-24 . See also Tay-Sheng Wang, “The Legal Development of Taiwan in the 20th Century: Toward A Liberal and Democratic Country” (2002) 11 Pac. Rim L. & Pol’y J. 531 at 542 (examining the legal modernization in Taiwan during the past century).

57 Chang, “East Asian Foundations”, *ibid.* at 123.

58 Ma, *supra* note 46, at 214.

worse, the ROC Constitution to Taiwan exhibited a far more instrumental use of the Constitution – to legitimize the act of legal annexation.⁵⁹

Evidently the three constitution-making experiences in East Asia involved neither romantic revolutions nor people's powers exercised to break from the dictatorial pasts. Due to the shared socio-political conditions in the late nineteenth century, Japanese and Chinese imperial governments took constitution-building as part of modernization project. Korea and Taiwan were both victims to such instrumental – and even militarized – ways of constitutional state-building, and each had to suffer from the consequences and fight for years to establish genuine constitutional democracies.

B. Textual and institutional continuity despite incremental changes

The second, perhaps rather astonishing, feature shared by the three constitutional democracies in East Asia is the textual and institutional continuity despite incremental constitutional progress and changes.

Japan's Constitution was promulgated in 1946 and became effective in 1947, but it has never been amended. It is now more than sixty years old, and the institutions it gave birth to such as Houses of Representatives and Councilors, Cabinet and the Supreme Court have already celebrated their respective sixty-year birthdays. It is evident that the textual and institutional continuity remains strong in Japan's course of constitutional developments. Such continuity, however, does not mean that no significant constitutional changes have taken place for the past six decades. It nevertheless signals that substantial constitutional changes must have been carried out not by formal amendments but by dynamic ways of constitutional practices, judicial decisions, legislative enactments, and even behavioral changes of political parties, social organizations and the people.

In Japan, incremental but nevertheless substantial reforms have been undertaken at the statutory level that have great constitutional implications. First and foremost were electoral reforms. The electoral law of the House of Councilors was revised in 1982 to introduce a fixed-list proportional representation system. Members of the House of

⁵⁹ Chang, "East Asian Foundations", *supra* note 49, at 131-33.

Councilors would consist of members elected under the proportional representation system and members elected under the constituency system.⁶⁰ In 2000, such a fixed list of proportional representation was further amended to be a more liberal, open-list system.⁶¹ Even more importantly, in 1994, the electoral law of the House of the Representatives underwent a radical change from a medium-size constituent system with one vote to candidate, which had been practiced more than half a century, to a dual system of a small single constituency and proportional system with two votes, one to the candidate the other to the political party.⁶² These electoral changes have exerted significant impact on politics. As illustrated earlier, in the mid 1990s, the LDP lost its entrenched political dominance, resulting in a more liberal political atmosphere that gave rise to major electoral reforms.⁶³ In 2007, the LDP alliance lost again in the election of the House of Councilors. Although the LDP still held a tight grip over the House of Representatives, certain legislative tension and even gridlock were already in sight.⁶⁴ Secondly, on the side of government reform, extraordinary efforts at the privatization of government-owned business and the liberalization of government-business relationship in the 1990s have rendered what scholars termed as “a dual state” where the traditional corporatist state loosened its grip.⁶⁵ These reforms, regardless of its success,⁶⁶ have effected a velvet revolution to the past entrenched governing structure and power implications without altering a word in the Constitution. Postwar judicial decisions of the Supreme Court also contribute significantly to such incremental changes with the textual stability, which shall be discussed in the next section.

60 The detailed discussion of the 1982 electoral method can be seen in a Japanese Supreme Court case where the relevant laws were challenged. See *Case to seek for nullification of an election* (14 January 2004), 58:1 Minshu (Japan S.C.). For the text in English, see online: Supreme Court of Japan <<http://www.courts.go.jp/english/judgments/text/2004.01.14-2003-Gyo-Tsu-No..15.html>>.

61 *Ibid.*

62 This legal change was also litigated in the Court, see *Case to seek invalidity of election* (10 November 1999), 53:8 Minshu 1577 (Japan S.C.). For its text in English, see Supreme Court of Japan <<http://www.courts.go.jp/english/judgments/text/1999.11.10-1999-Gyo-Tsu-No.8.html>>.

63 Primarily the electoral reform of the House of Representatives in 1994. However the electoral law reform for the House of Councilors was already undertaken in 1982.

64 Ginsburg et al, *supra* note 27, at 159-60.

65 OECD, *Japan: Progress in Implementing Regulatory Reform* (OECD, 2004); and Eiji Kawabata, *Contemporary Government Reform in Japan: The Dual State in Flux* (New York: Palgrave Macmillan, 2006) (detailing government reforms particularly postal reforms in the 1990s).

66 Some may argue the recent reform has failed, see e.g. Aurelia G. Mulgan, *Japan's Failed Revolution: Koizumi and the Politics of Economic Reform* (Asia Pacific Press, 2002)

South Korea, unlike Japan, has made formal constitutional changes more often. Its Constitution was enacted in July 1948 under the control of the United States Military Government, and subsequently amended eight times.⁶⁷ Since the last major constitutional revision that gave rise to a genuine constitutional democracy of the sixth Republic in 1987, the Constitution has not been revised. The past constitutional revisions always came in tandem with changes of political regimes. Despite being called “constitutional revisions” or “constitutional amendments”, they were often referred to as “New Constitution” such as the one in 1960 for the second Republic, the one in 1972 during the fourth Republic and the last in 1987 for the current sixth Republic.⁶⁸ However, the 1948 Constitution is recognized as the original Constitution. Throughout the years various institutional arrangements experiments such as a parliamentary or presidential political system, or diffused or centralized judicial review were carried out. Hence, in 1987 when the current “new” Constitution was contemplated, the many institutional options such as presidential system and constitutional review were hardly foreign to both sides of political players in democratizing politics. To many legal scholars, the Constitutional Court that was created in 1988 was really not “a new court” since it was adopted before.⁶⁹

In Taiwan, like South Korea, the 1947 ROC Constitution remained intact despite the many revisions that were added as appendices to the original text. During the authoritarian era, the Temporary Provisions for the period of communist rebellion were added in 1948 and subsequently amended five times till Chiang Kai-Shek died. With a similar pattern but in response to entirely different calls for democratization, the Additional Articles were added in 1991, making it possible for all national representatives to be elected in Taiwan, and subsequently were amended six times till 2005.⁷⁰ These incremental reforms have brought to Taiwan a vibrant constitutional democracy whose institutions and their respective functions are very different from

67 The 1948 Constitution was amended twice, in 1948 and in 1952, in the first Republic. It was amended in 1960 for giving rise to the second Republic, a short-lived but democratic regime. It was amended again in 1962 for the third Republic, then in 1969 and in 1972 for the fourth Republic. The 1972 Constitution was once called as “Yusin Constitution.” The Constitution was amended in 1980 for the fifth Republic and lastly in 1987 for the current sixth Republic. For discussions of the South Korean constitutional history, see Ahn, *supra* note 54; Dae Kyu Kim, “Constitutional Amendment in Korea” (1988) 16 Korean J. Comp. L. 1 at 1-13 (addressing the actual process of South Korean constitutional amendment).

68 See Ahn, *ibid*; Kim, *ibid*.

69 See Ahn, *ibid*.; Chong, *supra* note 30.

70 For detailed discussions of constitutional developments in Taiwan, see Yeh, *supra* note 10.

what was originally written.⁷¹ If one only reads the main text of the ROC Constitution, one could never correctly understand the actual functions of the various institutions. For instance, the Council of Grand Justices, which was already established in 1948 and is among the oldest courts still functioning in Asia, is a Constitutional Court whose actual functions today exceed much beyond the powers given by the original text of the Constitution. Yet still, the constitutional text of 1948 and institutions it adopted continue – if only in name – till this day.

In what ways can we take on this astonishing textual and institutional continuity in East Asia constitutionalism? Standard (Western) constitutionalism often emphasizes –even romanticizes – a revolutionary founding with a collective determination to break away from the past.⁷² The three main constitutional stories in East Asia, however, differ sharply from such a mythical or even constructed origin for establishing a liberal constitutional order. Despite the lack of any clear breaking points from the past, Japan, South Korea and Taiwan have evolved into stable constitutional democracies. Their respective textual and institutional continuity may be due to very different political or pragmatic reasons. Taiwan's constitutional continuity was primarily for signaling a symbolic sovereign claim over the Chinese mainland, whereas Japan's continuity may be due to an ever-lasting even battle between the conservative and the liberal regarding the revision of the peace clause.⁷³ The continuity in South Korea was nationalistic in signaling sovereign independence but at the same time indicative of the fact that the Constitution had not been taken seriously. Whatever the reason, the continuity has never obstructed constitutional transformations from taking place.

C. Reactive judicial review exercised with caution

Constitutionalism denotes not only rules governed by the Constitution but also a

⁷¹ See Jiunn-Rong Yeh & Wen-Chen Chang, "Path Dependency or Collective Institutional Choice? Modeling Constitutional Changes in the Context of Democratic Transitions" (2006) 45 *Issues and Studies* 1 [in Chinese with English abstract] [Yeh & Chang, "Path Dependency"] (explaining Taiwan's particular incremental pattern of constitutional changes).

⁷² Bruce Ackerman is one among many who advance this view. See Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1991). Ackerman however has later revised this view to a certain extent, see Bruce Ackerman, "Revolution on a Human Scale" (1999) 108 *Yale L.J.* 2279. For a contrasting view, see András Sajó, "Constitution without the Constitutional Moment: A View from the New Member States" (2005) 3 *Int'l J Const L.* 243.

⁷³ Higuchi, *supra* 52.

neutral and fair judiciary to ensure rules being followed in such a constitutional scheme. Without effective judicial review, constitutionalism can never be truly established. Today, effective judicial review is very evident in Japan, South Korea and Taiwan. The Supreme Court of Japan, despite a relatively shorter record of rulings against government actions, is seen as a very credible institution that facilitates a pluralist democracy.⁷⁴ The Constitutional Courts of South Korea and Taiwan have both earned acclaim for their respective judicial activism in steering democratic transitions and guarding human rights.⁷⁵ Both courts have on average denounced legislative enactments or ruled against government actions in about one third of its decisions ever since democratization began in the late 1980s.⁷⁶ Thus, a common understanding of judicial review in East Asia is that the Japanese Supreme Court is relatively conservative while the Constitutional Courts of South Korea and Taiwan are very active and even aggressive.⁷⁷

Underlying this usually held observation, however, there exists a more important common feature exhibited by the three courts in their exercise of judicial review: *reactive* and *cautious*. In our view, the three courts are reactive – rather than proactive – to social and political demands and are constrained largely by social and political circumstances. Neither court was proactively involved in any social and political agendas, nor challenged any majoritarian preference. In South Korea and Taiwan, where grand political and social transformations have been taking place since the 1980s, the record number of constitutional decisions that ruled against past legislation and government actions should not be seen as surprising nor characterized as “judicial activism”.⁷⁸ As illustrated in the following, both Constitutional Courts were merely responded to changing social and political demands, and their decisions were

74 Hasebe, *supra* note 8, at 305-07.

75 See e.g. Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) [Ginsburg, *Judicial Review*].

76 Chang, “The Role of Judicial Review”, *supra* note 11. See also *supra* note 9.

77 See e.g. Ginsburg, “Confucian Constitutionalism?”, *supra* note 18.

78 There is certainly more than one definition of “judicial activism”. If judicial activism denotes that a court strikes down a democratically enacted statute, both Constitutional Courts of South Korea and Taiwan in striking past legislation and government actions under color of authoritarian control cannot be said to really exhibit “judicial activism”. See e.g. Christopher Peters, “Adjudication as Representation” (1997) 97 Colum. L. Rev. 312 at 434. “Judicial activism” may also indicate courts ignoring precedent, judicially-made law, result-oriented judging or the exhibition of judicial preferences. See also Frank H. Easterbrook, “Do Liberals and Conservatives Differ in Judicial Activism?” (2002) 73 U. Colo. L. Rev. 1401; and Keenan D. Kmiec, “The Origin and Current Meanings of ‘Judicial Activism’” (2004) 92 Calif. L. Rev. 1441.

supported by the majority of rising reformist political alliances. In Japan, the social and political situation where the Supreme Court exercises power are very different from the rapidly democratizing circumstances in South Korea and Taiwan. The Japanese Supreme Court must protect its own institutional integrity, and negotiate with political branches with greater democratic legitimacy, a strong bureaucracy that observes the rule of law strictly and formalistically,⁷⁹ and a civic society that struggles for survival in rapid industrialization and changing culture.⁸⁰ As scholars have argued, the Court has to work with these institutional restraints and their decisions thus rendered cannot easily be judged as “conservative” even if rarely pronouncing government actions unconstitutional.⁸¹ Seen in this way, regardless of the number of decisions in striking down statutes, all three courts react to social and political circumstances and majority demands in a rather cautious way.

The Japanese Supreme Court, for example, has rendered less than a dozen of rulings that declared government acts unconstitutional, of which a significant part was concerned with equality of voting rights.⁸² In a decision of 1976, the Court found a ratio of discrepancy in voter representation as high as five times in violation of “one person, one vote” principle and voided the election result for the House of Representatives in such a mal-apportioned district.⁸³ In 1983, a similar challenge was made to an election for the House of Councilors, but the Court found no violation of the Constitution.⁸⁴ The Court’s decision in 1996, however, ruled again that a ratio more than six times in voter representation amounted to unconstitutionality but nevertheless granted a reasonable grace period for legislative redrawing of the district.⁸⁵ Notwithstanding that, recent decisions in 1999 and 2003 regarding electoral

79 Hasebe, *supra* note 8, at 298-300 (arguing that the reason that the Japanese Supreme Court rarely strikes down legislation is due to the strong capacity of the Cabinet Legislation Bureau and the Ministry of Justice in preparatory legal works, and even in case of legal deficiency or unconstitutionality, the Court would rather anticipate self-correction by these agencies and thus render decisions with some guidance).

80 See e.g. Frank Upham, *Law and Social Change in Postwar Japan* (Harvard University Press, 1987) at 131-33 (illustrating the Court’s role, while modest, in changing evolving social norms and even environmental ethics.)

81 Upham, *ibid*; Hasebe, *supra* note 8.

82 For a list of these decisions and their details, see Hasebe, *ibid.*; and Beer & Itoh, *ibid.*

83 *Kurokawa v. Chiba Prefecture Election Commission* (4 April 1976) (Japan S.C.). For the English translation of this case, see Beer & Itoh, *ibid.* at 355-75.

84 *Shimiza et al v. Osaka Prefecture Election Commission et al* (27 April 1983) (Japan S.C.). For the English translation of this case, see Beer & Itoh, *id.* at 355-375. See also Hasebe, *supra* note 8, at 302.

85 *Case on Election Invalidity* (11 September 1996), 1994 Gyo-Tsu No. 59 (Japan S.C.). For the text

formulas for the Representatives and Councilors were declared constitutional.⁸⁶

While the line of decisions appears to swing from one side to the other like a pendulum, it actually does not upon closer inspection. Rather, the way that these decisions were made was indicative of cautious judicial reactions to social and political circumstances. Throughout the 1970s, the LDP was faced with domestic and international crises and performed poorly at the polls.⁸⁷ The political alliance between the Socialist and Communist Parties was at its strongest then.⁸⁸ Such an unprecedented political opportunity not only gave rise to the toughest challenges at elections and of electoral disputes, but also created an environment where the Court could react more strongly. The unyielding tone in the 1976 decision was thus no surprise. As indicated earlier, the reform of electoral laws regarding the House of Councilors took place in 1982 and again in 2000, whereas such similar reform regarding the House of Representatives was in 1994.⁸⁹ The Court's 1983 decision was made on an electoral challenge in 1977. Since the electoral law regarding the House of Councilors was already changed, it was only reasonable for the Court not to alter any political status quo. Similarly, the 1996 decision – albeit dealing with elections of the House of Councilors – was rendered after huge electoral reforms on the electoral method of House of Representatives. While clearly expressing its dissatisfaction, the Court decided to give the reformist Diet more time to consider further reform for the House of Councilors, and such a reform was put into realization later. If further political deliberation is likely, the Court would leave such disputes alone – this is especially salient in the 1999 and 2004 decisions where newly made electoral laws were already put into challenge.

Two recent rulings also reflected this judicial tendency of reacting to political and

in English, see online: Supreme Court of Japan
 <<http://www.courts.go.jp/english/judgments/text/1996.9.11-1994-Gyo-Tsu-No.59.html>>.

86 The 1999 decision was on the constitutionality of the system of dual candidacy and proportional representation system in the election for members of the House of Representatives. There was, however, one issue concerned with the discrepancy of electoral district, but since such demarcation was concerned only with elections based on district but not with proportional representation system, the Court did not address the issue further. See *Case to seek invalidity of election*, *supra* note 62. The 2004 decision was concerned with the constitutionality of the open-list proportional representation system for the election of members of the House of Councilors. The Court decided that the choice of an open-list system was solely within the discretion of the Diet's power. See *Case to seek for nullification of an election* (14 January 2004), *supra* note 60.

87 Johnson, *supra* note 26, at 61-92, 175.

88 *Ibid.*

89 See *supra* notes 60-64 and accompanying text.

social demands while being attentive to political constraints and the majority will. In a 2005 ruling that declared the exclusion of Japanese nationals living abroad from participating in the House elections as unconstitutional, the Court paid a great deal of attention to the early electoral reform and the relevant discussions on the full guarantee of voting rights for Japanese nationals living abroad. It contended that it was possible for the legislature to take corrective actions in the last revision and thus the inaction amounted to illegality.⁹⁰ In a decision of 2008, the Court construed the *Nationality Act* in such a way to allow a child born out of wedlock to a Japanese father and a foreign mother to obtain Japanese nationality by reading into the liberal legislative intent of the earlier reform that allowed nationality to be passed by both gender and in a variety of circumstances.⁹¹

The South Korean Constitutional Court also exhibits such a reactive but cautious judicial attitude. On its face, the Court seemed fairly active and at times even aggressive in steering its democratizing agenda such as electoral redistricting,⁹² transitional justice⁹³ and presidential impeachment.⁹⁴ If examined carefully, however, even in response to some of the most highly contested issues, the Court has rarely directed its decisions against the political majority's preferences or sentiments. For instance, in the most difficult case concerning transitional justice, after the Special Act that allowed the prosecution of past wrongdoers was passed, the Court did not

90 *Case to seek declaration of illegality of deprivation of the right to vote of Japanese citizens residing abroad* (14 September 2005), 59:7 Minshu (Japan S.C.). For the text in English, see online: Japan Supreme Court <<http://www.courts.go.jp/english/judgments/text/2005.09.14-2001.-Gyo-Tsu-.No..82%2C.2001.-Gyo-Hi-.No..76%2C.2001.-Gyo-Tsu-.No..83%2C.2001.-Gyo-Hi-.No..77.html>>. See also Hasebe, *supra* note 8, at 303-04.

91 *Case on nationality of a child who born out of wedlock to a Japanese father and a Filipino mother* (4 June 2008), 62:6 Minshu (Japan S.C.). For the text in English, see online: Japan Supreme Court <<http://www.courts.go.jp/english/judgments/text/2008.06.04-2006.-Gyo-Tsu-.No..135-111255.html>>.

92 See e.g. *National Assembly Election Redistricting Plan Case*, *supra* note 45; and *One-Person One-Vote Case* (19 July 2001), 13-2 Korean Const. C.R. 77. For the text in English, see online: Constitutional Court of Korea <<http://english.court.go.kr/>>.

93 *December 12 Incident Non-institution of Prosecution case* (20 January 1995), 7-1 Korean Const. C.R. 15, in *The First Ten Years of Korean Constitutional Court* (Constitutional Court of Korea, 2001) 161; *May 18 Incident Non-institution of Prosecution Decision case* (15 December 1995), 7-2 Korean Const. C.R. 697 in *The First Ten Years of Korean Constitutional Court* (*ibid.*) 164; *The Special Act on the May Democratization Movement* (16 February 1996), 8-1 Korean Const. C.R. 51 in *The First Ten Years of Korean Constitutional Court* (*ibid.*) 168.

94 *The Impeachment of President (Roh Moo-hyun) Case* (29 April 2004), 16-1 Korean Const. C.R. 601. For the text in English, see online: Constitutional Court of Korea <<http://english.court.go.kr/>>.

rule it as unconstitutional as certain criminal charges had not expired statutory limitation and the necessary quorum for deciding on unconstitutionality fell short of one vote.⁹⁵ The majority opinion contended that the principle of rule of law prohibited *ex post facto* law and thus the part of the Act that allowed the prosecution of crimes beyond statutory limitation should be held unconstitutional.⁹⁶ Constrained by the necessary quorum however, the Court could not and did not run counter to the political majority's will.⁹⁷ Before this ruling, in about a year ago, the Court issued two decisions respectively regarding prosecutorial decisions not to charge ex-presidents, Chun Doo-Hwan and Roh Tae-Woo as well as other military officers. In the first case, although the Court clarified that certain charges had not expired statutory limitation, it adopted a lower standard and found the non-prosecution decision not arbitrary.⁹⁸ The second case became moot as the Court agreed to a withdrawal by the claimants, President Kim Dae Jung and many others, who were worried about that an unfavorable decision might undermine their parallel efforts of seeking a political legislative solution.⁹⁹ Evidently, while the Court might have a different view on rule of law and transitional justice, it did not choose to run directly against the political majority but self-willingly crafted their decisions under the many institutional and legalistic constraints.¹⁰⁰

The case on presidential impeachment conveys similar prudence. Having involved himself in serious political battles, President Roh Moo Hyun was impeached with 193 votes out of 272 members in the National Assembly and the case was moved to the Constitutional Court for resolution.¹⁰¹ The Court, despite its findings on certain acts by President Roh as violating his neutrality obligation and thus unconstitutional, reached a decision *en banc* not to impeach the President. It contended that those

95 It requires at least six votes, out of nine judges, to render a decision on the unconstitutionality of a law, impeachment, and dissolution of a political party, see Art. 113 (1) of the South Korea Constitution. The majority received only five votes in this case.

96 See *The Special Act on the May Democratization Movement*, *supra* note 93.

97 It is argued that the Court was fortunate to be shielded by this institutional constraint or perhaps even the Court was careful to take advantage of it. See Ginsburg, "Judicial Review", *supra* note 75.

98 See *December 12 Incident Non-institution of Prosecution Case*, *supra* note 93.

99 See *May 18 Incident Non-institution of Prosecution Decision Case*, *ibid*.

100 In the second case, as the dissenting opinion contended, even upon the claimant's withdrawal, it should still be within the Court's discretion to continue the case. Seen this way, the Court was in fact deliberately allowing the withdrawal, thus leaving room for subsequent political developments and legislation.

101 *The Impeachment of President (Roh Moo-hyun) Case*, *supra* note 94.

violations were insufficient to meet the standard of gravity, although this standard was not provided in the wordings of relevant provisions and was a novel judicial invention.¹⁰² Was the decision to not impeach President Roh an unusually proactive move that ran against the political majority? It was barely. The legislative motion to impeach President Roh was primarily due to inter- and intra- party struggles, not an expression of democratic will.¹⁰³ Perhaps tired of reckless political fights, public support for President Roh rose substantially after the legislative motion,¹⁰⁴ and even resulted in better electoral turnout for him and his political alliance.¹⁰⁵ By the time of the Court's decision, President Roh had already garnered sufficient support in the National Assembly. It was thus only wise for the Court not to impeach President Roh but at the same time took the institutional liberty to condemn some of his constitutional violations through judicial reasoning – a consolation to President Roh's opponents.

The same tendency for cautious judicial action is also found in the cases regarding electoral districting and the removal of the capital. In the former line of cases,¹⁰⁶ notwithstanding its unyielding insistence on a strict numerical voting representation of no less than one third in electoral districting, it exerted barely influences on politics entrenched by regionalism. In the case concerning the relocation of the capital,¹⁰⁷ the Court, referring to historical practice, considered Seoul to be the national capital and that this was an unwritten constitutional custom, ruling against the president's proposal to relocate the capital. The Court might appear to be running political risks but it was certainly very confident of its institutional capacity, as it knew that no popular consensus was ever reached on the capital relocation and no single powerful

102 See *ibid.* See also Youngjae Lee, "Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective" (2005) 53 Am. J. Comp. L. 403.

103 Facing the internal political struggles, President Roh publicly supported a newly formed party, the Uri Party. His original party and the opposition, the Millennium Democratic Party and the Grand National Party, thus formed a political alliance in the National Assembly to boycott his policies and even pass his impeachment motion. See Kie-Duck Park, "Political Parties and Democratic Consolidation in Korea" (2005) 2:1 Taiwan Democracy Q. 23 at 33-39.

104 The support for President Roh increased 20% after the impeachment motion, from 30% to 50%. See Samuel Len, "President's Impeachment Stirs Angry Protests in South Korea" *The New York Times* (13 March 2004).

105 James Brooke, "South Korea's Impeached President Gains Support in Vote" *The New York Times* (16 April 2004).

106 *National Assembly Election Redistricting Plan Case*, *supra* note 45. *Pledge to One-Person One-Vote Case*, *supra* note 92.

107 *The Relocation of the Capital City Case* (21 October 2004), 16-2(B) Korean Const. C.R. 1. For the text in English, see online: Constitutional Court of Korea <<http://english.court.go.kr/>>.

political party dominated the congressional platform at the time.

Taiwan's Constitutional Court also exhibits such a reactive but cautious line of judicial reasoning. Since politics in Taiwan has been fiercely contested, it was no surprise that the Court engaged in politically significant and very sensitive cases. While the Court has never declined to accept politically sensitive cases, it has two sharply distinctive patterns in dealing with such cases. First, if political consensus—even if only potential—was in sight, the Court would be very clear in stating what the political majority expected in constitutional terms. One of the milestone decisions, *Interpretation No. 261*, where the Court ordered senior representatives to leave office and set the deadline for reelection, was such an example.¹⁰⁸ In that case, a national consensus to undergo extensive democratization and suspend the old parliament was already reached in the National Affairs Conference.¹⁰⁹ Other examples are *Interpretation No. 325*¹¹⁰ and *Interpretation No. 499*¹¹¹, among many others. The Court's decisions there were merely reacting to what had already been consented by the public and key political alliances with regard to the course of democratizing agenda.

Second, in a sharp contrast, if politics was more divided however, the Court tended not to be clear in its decisions and sometimes even intended to have manipulatively obscure or ambiguous tones. For instance, in *Interpretation No. 419*, where the issue was that the elected Vice-President was assuming premiership at the same time, the Court responded that although the Constitution intended not to have the same person assuming both offices, the practice at issue was not yet in direct contravention of the Constitution since it has not generated any genuine difficulty in institutional functions.¹¹² In *Interpretation No. 520*, the Court was asked whether the executive

108 *Judicial Yuan Interpretation No. 261* (21 June 1990) (Taiwan Const. C.). For the text in English, see online: Judicial Yuan
<http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=261>.

109 Chang, "The Role of Judicial Review", *supra* note 11.

110 *Judicial Yuan Interpretation No. 325* (23 July 1993) (Taiwan Const. C.). For the text in English, see online: Judicial Yuan
<http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=325>.

111 *Judicial Yuan Interpretation No. 499* (24 March 2000) (Taiwan Const. C.). For the text in English, see online: Judicial Yuan
<http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=499>.

112 *Judicial Yuan Interpretation No. 419* (31 December 1996) (Taiwan Const. C.). For the text in English, see online: Judicial Yuan
<http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=419>.

may unilaterally – without parliamentary consent – suspend the construction of a power plant as promised by a newly elected President. The decision was again very ambiguous in deciding whether the executive or the parliament had the final say.¹¹³ Also a recently contested issue, whether the Legislative Yuan had exceeded its powers in setting up an investigation commission on the shooting before the presidential election of 2004 was brought to the Court. Again, the Court issued a decision stating such a commission was constitutional insofar as it exercised the investigation powers of the Legislative Yuan.¹¹⁴ When the decision was released, no one was sure whether the Court was really referring to the constitutionality of the existing commission and whether such a commission could still be organized.

This pattern shows that the Taiwanese Constitutional Court, much like its counterparts in Japan and in South Korea, has persistently reacted to political and social demands while taking caution to prevent itself from being regarded as “counter-majoritarian”.

D. A wide range of rights in tune with social and political progress

The protection of fundamental human rights stands at the core function of modern constitutionalism. A comprehensive list of such fundamental rights spans from civil and political rights, economic freedoms, to labor rights and economic, social and cultural rights. In Japan, South Korea and Taiwan, some – if not all – of these rights are provided for in their respective Constitutions or adopted by ratifying international human treaties.¹¹⁵

¹¹³ The Court contended that the executive surely had the power to make significant policy changes as the result of presidential election, but at the same time the parliament maintained a co-partaking power in such major policy change. Thus, the executive must report to the parliament for such a major policy change and both worked on a final solution. See *Judicial Yuan Interpretation No. 520* (15 January 2001) (Taiwan Const. C.). For the text in English, see online: Judicial Yuan <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=520>.

¹¹⁴ *Judicial Yuan Interpretation No. 585* (15 December 2004) (Taiwan Const. C.). For the text in English, see online: Judicial Yuan <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=585>.

¹¹⁵ Both Japan and South Korea ratify the two main human rights treaties, the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, ratification by Japan 21 June 1979, accession by South Korea 10 April 1990 with reservation) [ICCPR] and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976, ratification by Japan 21 June 1979, accession by South Korea 10 April 1990) [ICESCR]. They both are also members of important second-tier treaties such as the *Convention against Torture*, 10 December 1984, 1465

Thus, at least on its face, Japan, South Korea and Taiwan have warmly embraced the fundamental human rights of our times, despite the claim of “Asian values” made by other authoritarian leaders in East Asia such as ex-Prime Minister Lee Kuan Yew of Singapore. However, to what extent are human rights enforced in these countries, especially in judicial decisions? Would there be any variations in practice? Would there be any particular emphasis over some types of rights over others? Third-world countries often argue that Western democracies are often biased in emphasizing civil and political rights over social and economic rights. They insist instead that satisfying basic human needs come first and hence the protection of economic and social rights are preconditions for constitutional democracies.¹¹⁶ Was this debate also evident in East Asia particularly in adjudication of human rights?

We believe not so. There has never been any particular judicial agenda or preference of some rights over the other in adjudication of rights in the three countries. Rather, human rights cases in these courts spanned from rights to vote, religious freedoms, freedom of speech, freedom of association, gender equality, to economic freedom, right of property, labor rights and right to education.¹¹⁷ These cases appeared as responding to ongoing economic and social demands rather than any particular ideological agenda. For example, in Japan, in about a dozen cases where the Supreme Court ruled government acts unconstitutional, they covered a wide range of rights from equality of voting rights, economic freedoms, religious freedoms and rights to government compensations.¹¹⁸ Most recent cases were concerned with the rights to vote of Japanese citizens residing abroad¹¹⁹ and the right to nationality of a child born out of wedlock with a Japanese father and a foreign mother,¹²⁰ which arose from the

U.N.T.S. 85 (entered into force 26 June 1987, accession by Japan 29 June 1999, accession by South Korea 9 Jan 1995); the *Convention on Rights of Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force 2 September 1990, ratification by Japan 22 April 1994, ratification by South Korea 20 November 1991); and the *Convention on Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981, ratification by Japan 25 June 1985, ratification by South Korea 27 December 1984 with reservation) among many others. Because of its controversial international status, despite the fact that the ROC was signatory to both *ICCPR* and *ICESCR*, Taiwan was not provided any chance to provide its ratification to the two treaties to the United Nations.

116 See Henry Steiner *et al.*, *International Human Rights in Context: Law, Politics & Morals*, 3rd ed. (New York: Oxford University Press, 2008) at 261-79 and 295-312 (3rd ed. 2008).

117 See *supra* note 19-21 and accompanying text.

118 Hasebe, *supra* note 8, at 297.

119 *Case to seek declaration of illegality of deprivation of the right to vote of Japanese citizens residing abroad*, *supra* note 90.

120 *Case on nationality of a child who born out of wedlock to a Japanese father and a Filipino mother*,

globalizing social order in Japan. If examined carefully, the timing of these cases was quite in tune with social and economic progresses. Even those cases that challenged the government's relationship with Shinto were brought by civil and social groups.¹²¹ Similarly, in South Korea and Taiwan, as the two societies have been undergoing major political changes in tandem with social and economic ones,¹²² the two Constitutional Courts have been busy with both civil and political rights as well as economic and social rights. The South Korean Constitutional Court was able to resolve important cases spanning from equal rights to vote, freedom of expression, freedom of press, gender quality and labor rights.¹²³ The Taiwanese Court was also handed similar cases.¹²⁴

It is noteworthy to study how the three courts dealt with cases concerning gender equality. Despite the predominantly patriarchal family traditions in their societies, the three courts have all handed down liberal decisions securing gender equality in family, at work and even in terms of social relationships.¹²⁵ This liberal attitude towards gender equality, however, should not be explained by judicial activism, but rather, reactive judicial response to changing and ever growing women movements in three countries. Additionally noteworthy is that insofar as judicial decisions of rights are concerned, there has never been any particular emphasis on the citizen's duty or a duty-based interpretation of rights. Instead, it is more often for the three courts to demand that it is the state's duty to protect its citizens' fundamental rights, a duty that has been well recognized in international human rights law and found its way to European rather than Anglo-Saxon constitutional jurisprudence.¹²⁶

supra note 91.

121 See e.g. *Judgment on the enshrinement of a dead SDF officer to Gokoku Shrine* (1 June 1988), 1982 (O)No. 902 (Japan S.C.); and *Judgment upon constitutionality of the prefecture's expenditure from public funds to religious corporations which held ritual ceremonies* (2 April 1997), 1992(Gyo-Tsu) No. 156 (Japan S.C.).

122 See e.g. Jiunn-Rong Yeh, "Changing Forces of Constitutional and Regulatory Reform in Taiwan" (1990) 4 J. Chinese L. 83; and Chong, *supra* note 30.

123 See *supra* note 20 and accompanying text.

124 For more detailed analysis, see Chang, "The Role of Judicial Review", *supra* note 11, at 86-87.

125 For Japanese cases, see Hasebe, *supra* note 8. For Korean cases, see Rosa Kim, *supra* note 20, at 145-62.

126 See Steiner et al, *supra* note 116, at 496-507.

III. East Asian Constitutionalism in Comparison

The common features shared by constitutional developments in Japan, South Korea and Taiwan are illustrated above. It is interesting to examine further whether – and to what extent – these common features defy traditional features shared by advanced constitutional democracies particularly in the West. It is even intriguing to explore whether – and to what extent – these features are a part of the result in shared socio-political histories of East Asia or they are in fact institutional embodiments of certain distinctive East Asian values. Particularly interesting is the question of whether those features illustrated above have qualified East Asian constitutionalism an autonomous one in an era of global constitutionalism. In what follows, we advance this comparison from three perspectives: standard (Western) constitutionalism, transitional constitutionalism and Asian values.

A. Comparisons with standard (western) constitutionalism

Constitutional development in Korea, Japan and Taiwan as indicated above shares great commonalities. It is no surprise to find that East Asian constitutionalism has been advanced by and large in tandem with the standard constitutionalism developed in the West. For example, East Asian constitutionalism embodies basically liberal constitutional structures, enshrining popular sovereignty, placing checks and balances among government powers, and empowering courts to safeguard the rule of law and individual rights. Evaluating them by the typical standards for (western) constitutionalism,¹²⁷ all three East Asian constitutional democracies have by and large satisfied these requirements.

Notwithstanding framework commonalities, the East Asian constitutionalism has developed, in contrast with its Western counterparts, into some distinctive features of its own. For instance, all of them lacked a clear founding moment and observed – perhaps too strictly – textual and institutional continuity in gradual constitutional evolutions.¹²⁸ Second, while most western constitutional jurisprudence develops the

127 Such as those developed by Louis Henkin, *supra* note 2, at 39-53. Traditional constitutionalism views a constitution as the guardian of fundamental rights through constraining government powers, including limited government, separation of powers, checks and balances, and judicial review.

128 See *supra* notes 60-73 and accompanying text.

idea of constitutionalism as an end in itself, real constitutional experiences in East Asia clearly began with its instrumental value in facilitating modernization.¹²⁹ Constitutional institutions were from the start seen as part of state apparatus and only gradually evolve into democratic ones after decades of struggles.

Regarding judicial review, all three courts are mostly trusted constitutional institutions compared to their governments and parliaments. Still, as elaborated above, the three courts have reacted to social and political demands with a very self-conscious observance of larger institutional and social constraints. Despite their popularity, the three courts have never insisted on constitutional values without any underlying political and public consensus nor have they openly defied the will of the political majority. While standard (Western) constitutionalism may endorse judicial defiance with the political majority, the three courts are certainly reluctant followers of that tradition. Additionally, the way that rights were recognized and affirmed in judicial discourse of the three countries was more reflective of constitutional contexts and constructive in nature. It requires more complex conciliation between rights with changing social context.¹³⁰

The differences above mark a clear contrast with the theory of constitutionalism that deem the embodiment of constitutional institutions and the protection of civil and political rights as gains of revolutionary triumphs.¹³¹ What is really shared between East Asian constitutionalism and standard (Western) constitutionalism is a very thin understanding of the liberal constitutional foundation upon which state, society and individuals are defined in one aspect in terms of state-centered institutions and rights guarantees.

B. Comparison with transitional constitutionalism

In the wake of the third wave democratization, constitutional developments have been assessed against the backdrops of profound social transitions, breeding the regime of transitional constitutionalism.¹³² Two of the constitutional democracies that we

¹²⁹ See *supra* notes 46-59 and accompanying text.

¹³⁰ See *supra* notes 118-125 and accompanying text.

¹³¹ Jiunn-Rong Yeh & Wen-Chen Chang, "The Changing Landscape of Modern Constitutionalism: Transitional Perspective" (2009) 4 NTU L. Rev. 145 [Yeh & Chang, "The Changing Landscape"].

¹³² *Ibid.* See also Ruti Teitel, "Transitional Jurisprudence: The Role of Law in Political

observe in the East Asian context belong to the group of new democracies, representing strong resemblance of East Asian constitutional development to transitional constitutionalism.¹³³

In the three East Asian countries, constitutional developments were undertaken to tackle with larger political and social transformations underpinned on certain legal continuity. Despite clashes among political forces over major controversies, constitutional means were employed as background norm for political negotiation and competition, forming dialectic constitutional undertakings against profound transformation. Courts have also performed important roles in the flux of political dealings and changes. All these features resemble strongly a transitional nature of constitutionalism in transitional democracies.¹³⁴

The flip side of the coin, however, displays East Asia's certain departure from this typical transitional constitutionalism developed in East and Central Europe, Latin America and South Africa. First, constitutional transitions have not particularly focused on the transformation from controlled economy to liberal market in the East Asian context, as a relatively stable market economy had already been in place.¹³⁵ Secondly, the tension between civil and political rights and social and economic rights was not as strong as that in the East and Central European context. As indicated above, there has never been any ideological struggle between the types of rights in East Asia. Rather, rights have been developed and reaffirmed through social and political progress, and in South Korea and Taiwan, political rights and labor rights were almost recognized at the same time of political liberalization.

Additionally, judicial activism that runs counter to the will of the political majority has been widely recognized as a key feature of transitional constitutionalism typically exemplified by the South African Constitutional Court, the Hungarian Constitutional

Transformation" (1997) 106 Yale L.J. 2009 (arguing a transitional perspective in constitutionalism); Ulrich K. Preuss, "The Politics of Constitution Making: Transforming Politics into Constitutions" (1991) 13 Law & Pol'y 107; Jonathan D. Varat, "Reflections on the Establishment of Constitutional Government in Eastern Europe" (1992) 9 Const. Comment. 171; and Arthur J. Jacobson, "Transitional Constitutions" in Michel Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspective* (Duke University Press, 1994) 413.

133 See Yeh & Chang, "The Changing Landscape", *supra* note 131 (discussing features and challenges of transitional constitutionalism).

134 *Ibid.*

135 See *supra* notes 24-25 and accompanying text.

Court, among many others.¹³⁶ The judicial attitude in East Asia, however, while also boldly reacting to ongoing social and political demands, exhibits a much more cautious tone and provided much more space for political dialogue and decisions. Lastly, constitutional developments in the East Asian context have been advanced by individual states without regional or international collaborations. This marks a departure from typical transitional constitutional developments in East and Central Europe that were largely shaped and aided by international and regional communities.¹³⁷ Seen in this way, the commonality displayed by the three constitutional experiences of East Asia seems more intriguing intellectually.

C. Comparison with constitutional discourse shadowed by “Asian Values”

In line with the “Asian values” discourse, East Asian constitutionalism bears certain similar features. For instance, the three courts have rarely demanded citizen’s duties in constitutional context, but they did emphasize the state’s duty to protect citizen’s economic, social or political engagements and even full realization. As discussed earlier, the discourse of state’s duty to protect citizens – while not unfamiliar in European constitutional traditions – defies at least Anglo-Saxon constitutional traditions that convey a much more autonomous concept of individuals and their relationship with others.¹³⁸ East Asian courts, in stressing the state’s duty to fulfill individual demands, does imply a rather community-centered structure – if not epistemology – under which constitutionalism have been developed.

Moreover, one of the common features displayed by the three East Asian constitutional democracies is an instrumental use of constitutions, in that the constitutions are taken as a useful means to achieve social solidarity and advance nation building. This certainly echoes the state-centered and development-oriented Asian values discourse. Also, it was argued that the respect of decisions by constitutional courts in East Asian democracies might link to their traditional respects paid to the wise class of elites.¹³⁹ At the same time, however, the empowerment of

136 See *supra* note 132.

137 See Yeh & Chang, “The Changing Landscape”, *supra* note 71 (providing four models of constitutional change for new democracies).

138 See *supra* note 126.

139 See Ginsburg, “Confucian Constitutionalism?”, *supra* note 18.

courts in East Asia has been convincingly explained by accounts that equally apply to other contexts.¹⁴⁰

Indeed, the development of East Asian constitutionalism has gone far beyond the “Asian values” argument and to a substantial extent has contradicted its claims. In defiance of the “state before self” thesis, East Asian constitutional developments have focused on constraining the exercise of government powers and empowering a vibrant civil society. As indicated earlier, a thin liberal constitutional foundation upon which the three constitutional developments have relied is certainly shared by modern (Western) constitutionalism. Civic and political rights are no less important than collective values or public morals in individuals’ rights claims as well as judicial discourse. The pursuit of gender equality has been strong in the three societies and all endorsed by courts notwithstanding their rather patriarchal social and family structure.¹⁴¹ Media in Korea, Taiwan and Japan have enjoyed an autonomous status with independent operations, gradually creating a public space that is neither state nor market-owned and allowing for open criticism and public deliberation.¹⁴²

IV. Conclusion

Even up till now, constitutionalism and “East Asia” are still sometimes being taken as paradoxical terms, a view mostly evident in the “Asia values” discourse. Constitutional developments in East Asia are treated as peripheral in comparative constitutional studies. As we have seen in this paper, however, vibrant constitutional democracies have taken hold in East Asian soil. Japan, South Korea and Taiwan have grown to full blossoming in their respective constitutional developments. Aside from vibrant constitutional politics, the accumulated constitutional jurisprudence by the Supreme Court of Japan and the Constitutional Courts of South Korea and Taiwan have shown a significant level of constitutional culture deserving serious scholarly attention. Constitutional developments in East Asia can no longer be simplified as laggard behind Western constitutionalism nor as fictional device underlying the

140 See Ginsburg, *Judicial Review*, *supra* note 75 (providing an insurance theory to explain why courts have been empowered particularly in the context of new democracies in Asia).

141 See *supra* note 125 and accompanying text.

142 The openness and autonomy of media in the three democracies in East Asia have often been used as the benchmark to evaluate media developments of other parts of Asia. See e.g. Benjamin L. Liebman, “Watchdog or Demagogue? The Media in the Chinese Legal System” (2005) 105 *Colum. L. Rev.* 1.

“Asian values” discourse.

In this paper we have analyzed constitutional developments in Japan, South Korea and Taiwan. By reading the three cases together, we have discerned a number of common features shared by the three experiences. They include instrumental constitutional state building, textual and institutional continuity, reactive judicial review exercised with cautions, and finally, a wide range of rights claims and interpretations that were made in tune with social and political progresses. We argue further that these features developed in East Asian constitutionalism do not merely mirror standard (western) constitutionalism nor are under the shadow of “Asian values” or merely in tandem with transitional constitutionalism. The full blossom of East Asian constitutionalism has shed a new light on contemporary constitutionalism and moved itself from periphery to the center of comparative constitutional studies.