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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

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Abstract:
Vibrant constitutional democracies have taken hold in East Asian soil. Japan, South Korea and Taiwan came to mind as successful examples. Scant attention, however, has been placed upon ways that constitutionalism has been brought into being and developed into distinctive forms in East Asia. This paper seeks to analyze in a descriptively way constitutional developments in Japan, South Korea and Taiwan. By reading the three cases together, this paper discerns a number of common features shared by the three constitutional developments, 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 progresses. 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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I. 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, 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

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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 CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 39-53 (Michel Rosenfeld ed., 1994); Nevil Johnson, Constitutionalism: Procedural Limits and Political Ends, in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 46-63 (Hesse & Johnson eds., 1995).

³ We call this as the rise of “transnational constitutionalism”, see Jiunn-Rong Yeh & Wen-Chen Chang, The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions, 27 PENN STATE INT’L L. REV. 89 (2008).
the evolutionary process by which traditional European states have moved closer to one another in a constitutional sense are best illustrative.\(^4\) 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 African Unity, 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 today’s constitutional developments in East Asia? 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 mostly recognizable constitutional democracies. Japan was transformed into a peaceful,


\(^5\) For how the NAFTA would be seen as certain kinds of constitutional framework in the region, see David Schneiderman, Constitution or Model Treaty? Struggling over the Interpretive Authority of NAFTA, in THE MIGRATION OF CONSTITUTIONAL IDEAS 294 (Sujit Choudhry ed., 2006) (contending that there exists a constitutional mode for interpreting NAFTA).

\(^6\) For its process and relevant texts, see http://www.africa-union.org/About_AU/au_in_a_nutshell.htm (last visited Nov. 1, 2008)

\(^7\) For a more thorough discussion on Asian Value discourse, see infra notes 16-17, and accompanying text.
liberal constitutional democracy by the making of the postwar Constitution in November 1946. Till this day, the Constitution has never been amended but nevertheless delivered vibrant constitutional functions such as periodical parliamentary elections, government transfers 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.  

South Korea undertook a successful democratization in 1987, leading to a largely revised Constitution and a new Constitutional Court. In the two decades, government powers have changed into oppositions and changed back, swinging among various political parties. Perhaps most credible has been the performance of the South Korean Constitutional Court. In its decisions involving constitutionality of statutes or government actions, about a third are rulings that denounced their constitutionality. 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. The government power was peacefully changed into the long-term opposition in 2000 and swung back again in 2008. The Constitutional Court of Taiwan, despite an old


9 In 1,765 decisions that the Court rendered about constitutionality of statutes or government actions, it has 588 decisions as unconstitutional (319), unconformable to Constitution (118) and unconstitutional in certain context (51). See Case Statistics of the Constitutional Court of Korea, available at http://www.ccourt.go.kr/english/ (last visited Feb. 2, 2009)

10 For a more detailed discussion of these constitutional revisions, see Jiunn-Rong Yeh, Constitutional Reform and Democratization in Taiwan: 1945-2000, in TAIWAN’S MODERNIZATION IN GLOBAL PERSPECTIVE 47-77(Peter Chow ed., 2002) (analyzing Taiwan’s dynamics of constitutional change over the last 55 years along the line of the national drive for modernization and political democratization).
institution already established in 1948, began exhibiting judicial activism in the 1990s and reached to a high peak on unconstitutional rulings of thirty to forty percent.\textsuperscript{11}

It is evident that Japan, South Korea and Taiwan are qualified as functioning constitutional democracies in East Asia. 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. Among the three, Japanese constitutional politics or decisions of the Japanese Supreme Court are discussed most.\textsuperscript{12} Yet they are often being discussed as cultural variables to standard (western) cases or being referred as examples of “even there” having such constitutional practices.\textsuperscript{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 must turn their attentions to the East and reshape the dialogues between the two.

\section*{II. East Asia in Political and Constitutional Contexts}

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\textsuperscript{12} See e.g. VICKI C. JACKSON & MARK TUSHNET, \textit{COMPARATIVE CONSTITUTIONAL LAW} (1999) (discussing some of the Japanese constitutional designs and cases but not those of South Korea and Taiwan); EDWARD MCWHINNEY, \textit{SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW} (1986); FRANCOIS VENTER, \textit{CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL CASES} (2000).
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\textsuperscript{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. \textit{See} The Paquete Habana, 175 U.S. 677 (1900).
\end{flushright}
The development of legal scholarship on/about East Asia has been primarily responded to the need of trade and investment from the West. With dramatic economic boosts 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 attentions 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 focus still primarily on economic aspects.\(^{15}\) Not until rapid social and political changes took place in the 1980s would scholarly attentions 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


\(^{16}\) A transcript of interview with Lee, *see* Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, 73 FOREIGN AFF. 109, 111 (1994). 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.” Quotation and a concise review of Asian Value Debate, *see* Karen Engle, *Culture And Human Rights: The Asian Values Debate In Context*, 32 N.Y.U. J. INT’L L. & POL.
democracy and human rights from the West. Despite political progress made in Japan, South Korea and Taiwan, Lee contended that human rights nurtured in the western soil were not applicable to the East. In response to such so-called Asian-value discourse, a number of scholarly works began describing “East Asia” or “Asia” as an analytical category that either exhibits as a culture no different from any other cultures in terms of capacities to reflect upon universal human rights values or presents as a site -geographic, ideological as well as linguistic- like any other sites in which universal values are constantly dialogued with and challenged by particular values or ways of lives.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 at “discovering” 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 in that “East Asia” belongs to such a rather exotic category that may (or may not) be comparable to modern (western) constitutional democracies.


17 See e.g. Michael C. Davis, Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values, 11 HARV. HUM. RTS. J. 109 (1998) (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 argues that the so-called “culture” in east / south-east Asia, is not a mere idea, but a vocabulary for contesting a certain type of hegemony. The concept of “Asian values” can be used both for and against human rights. See id.

18 See e.g. Victoria Tin-Bor Hui, Toward A Confucian Multicultural Approach to A Liberal World Order: Insights from Historical East Asia, 99 AM. SOC’Y INT’L L. PROC. 413 (2005) (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, 27 LAW & SOC. INQUIRY 763 (2002) (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”).
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 right and the peace clause. 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. With

19 See e.g. Setsuo Miyazawa, The Politics of Judicial Reform in Japan: The Rule of Law At Last?, 2 ASIAN-PAC. L. & POL’Y J.89, 89-121(2001) (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, 22 CAL. W. INT’L L.J. 135 (1991) (suggesting that when Japan is attempting to contribute to the development of the international community, its forces of discrimination are being challenged.); Lawrence W. Beer, Peace in Theory and Practice Under Article 9 of Japan’s Constitution, 81 MARQ. L. REV. 815-829(1998) (explaining why Japan became antimilitarist and how Article 9 has affected Japanese 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, 27 MICH. J. INT’L L. 55, 55-113(2005) (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, 33 YALE. J. INT’L L. 266 (2008) (suggesting that despite amending its constitution to confirm that what many believe is already a reality when Japan is on its remilitarization process, Japan still faces increasingly suspicious and hostile environment internationally).

regard to Taiwanese constitutional developments, the body of scholarship examines constitutional reform, judicial review, abortion right and privacy.\textsuperscript{21} The writing of this paper is to reject the above two tendencies. We attempt at addressing recent constitutional developments in Japan, South Korea and Taiwan in the category of East Asia without any implicit or embedded doubts as to its comparability with modern (or western) constitutionalism.\textsuperscript{22} We seek to put the three cases together and analyze -rather descriptively- what have been developed there. By reading into the three cases, we attempt at discerning if there is any commonality among them and whether we may draw any theoretical implications from such commonality or contrarily differences.

\textbf{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, much shared and comparable social foundations exist for the three countries and have provided with them fairly comparable preconditions for establishing constitutional democracies.

\textit{1. Sustained economy after rapid growth}


\textsuperscript{22} A closest attempt may be an earlier effort of putting many constitutional systems of Asia together in a book by Lawrence Beer. \textit{See} LAWRENCE BEER, \textit{CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA} (1991).
Economic foundations for building constitutional democracies in East Asia are comparably better. Japan was quickly recovered from World War II and moved rapidly on their economic ladder to advanced economies in the 1960s. With the economic boom in the 1970s and 80s, it has stood firm in advanced countries despite significant slowdown beginning in the 1990s. 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. Taiwan also came up with steady economic growth despite rising competition with China. It is fair to conclude that vibrant economic developments in the three countries have provided comparably better conditions for their respective democratic and constitutional reforms.

2. 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 (hereinafter LDP), various political forces have never ceased to challenge the dominance of the LDP and to compete in major elections. In the mid 1990s, the LDP lost its political dominance in decades, and that gave rise to a series of new...
political openings, the primary of which was the reform on electoral laws. In 2007, the LDP with its 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.

Notwithstanding 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. Since then government powers have swung among various political parties. In Taiwan, there have been seven rounds of constitutional revisions since democratic openings. The first transfer of government powers 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 competitions.

27 See infra notes 60-62 and accompanying text. See also Tom Ginsburg et al., (Roundtable) Judicial Review in New Democracies: Constitutional Courts in Asian Cases, 3(2) NTU L. Rev. 144, 158-59 (2008).

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 8-9, 14(1996)

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 the party 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 RECENT TRANSFORMATION IN KOREA LAW AND SOCIETY 11-32 (Dae-Kyu Yoon ed, 2000).

31 Yeh, supra note 10.

32 Linz & Stepan, supra note 28.
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. Civil societies in the three societies have met with such vibrancy and even played key roles in pushing social reforms preceding political reforms. In both South Korea and Taiwan, professional organizations typically lawyers were involved in the many legislative reforms and constitutional litigations that catalyzed subsequent political changes.

3. Stable social structure with family underpinnings

One of the most important social features shared by the three societies is perhaps their family structures influenced by Confucianism and its patriarchal teachings. 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. At the same time, however, rapid industrialization and economic growth that brought working labors from villages to metropolitan areas have posed great challenges to traditional families. A great deal of traditional families have been

33 Id. at 9.
35 See generally WILLIAM P. ALFORD ED., RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA (2007), and see also Chong, supra note 30 (describing the role of lawyers, prosecutors as well as law professors in South Korea’s democratic transitions); Jane Kaufman Winn, The Role of Lawyers in Taiwan’s Emerging Democracy, in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 356-382 (William P. Alford ed., 2007).
transformed into so-called a nuclear type of families where the relationship of family members are reshaped.\(^{37}\) Gender equality and the relationship between parents and the child are the two areas witnessing most profound changes.\(^{38}\) Individuals have gradually tended to identify themselves as individuals rather than members of clans or traditional families. 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 forming concept of rights in their respective societies.

4. Ethnic homogeneity despite local divides

Japan, South Korea and Taiwan have been regarded as largely homogenous in terms of ethnic structure, which provided a good foundation for developing democracy.\(^{39}\) Ethnically homogenous notwithstanding, strong local divides have persistent in the three societies and exerted significant impacts on constitutional developments. Among the three, Taiwan has been identified as more divided than

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\(^{39}\) BENJAMIN REILY, *DEMOCRACY AND DIVERSITY: POLITICAL ENGINEERING IN THE ASIA-PACIFIC 37, 57-58 (2006).*
Japan and South Korea. In Taiwan, the political divide between mainlanders who came to Taiwan after World War II and local Taiwanese has had intensive impacts on electoral results and competitions of political parties. The voting preference of mainlanders and their descendants persists to be for the past ruling party that had a closer tie to the mainland while local Taiwanese may divert their votes for other parties.

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

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40 Id. at 63.
42 See e.g. David C. Kang, Regional Politics and Democratic Consolidation in Korea, in KOREA’S DEMOCRATIZATION 161-180(Samuel S. Kim ed., 2003); Chung-Si Ahn, Transformation of South Korea Politics and Prospects for Democratic Consolidation, in POLITICS AND ECONOMY OF REGIME TRANSFORMATIONS 23, 23-40 (Chung-Si Ahn & Chon-Pyo Lee eds., 1999);
44 Horiuchi, id.
45 Excessive Electoral District Population Disparity Case, 7-2 KCCR 760, 95Hun-Ma224, etc., December. 27, 1995 (rendering that disparity cannot constitutionally exceed more than four times); National Assembly Election Redistricting Plan Case, 13-2 KCCR 502, 2000Hun-Ma92, etc.,(consolidated),October 25, 2001 (rendering that disparity cannot exceed beyond one third). For the text in English, see http://english.ccourt.go.kr/ (last visited Nov. 28, 2008)
IV. East Asian Constitutionalism in the Shaping: Distinctive Features

Postwar constitutional developments in Japan, South Korea and Taiwan, notwithstanding differences, have exhibited important common features that must 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 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. When any building of constitutional state is entangled with (or even itself is) a larger material project, such a constitutional state would easily become instrumental and runs a huge risk of being manipulated or further suspended for some even greater (often materialized) end-goals. 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,

46 See e.g. LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN’S TWO CONSTITUTIONS, 1889-2002 7-21 (2002) (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, 57 AM. J. COMP. L. 205 (2009) (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, 9 J. CHINESE L. 207, 214 (1995) (stating that constitution-making was undertaken as part of modernization in China in the late nineteenth twentieth century).
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 prosperity, faculty and progress of the Imperial Japan. However, such constitutions would be buried long before any ingenious democratization attempt would occur. Not much of any enlightenment or people’s self-pursuit in liberalization was ever mentioned in the constitutional document. After World War II, the Constitution was primarily enacted under foreign pressures, and the first draft that primarily became the final product was even written by General MacArthur’s legal team in two weeks. In order to save the integrity of the Japanese Emperor, the postwar government conceded to accepting renunciation of imperial sovereignty, democratic governance and the peace clause. While there were still some genuine local efforts at constitutional reforms from civil and lawyers groups, the lack of a people’s democratic self-pursuit was evident, and the Constitution was hardly a self-inspiring 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

47 Beer & Maki, *id.*


50 Article 9 of the Japanese Constitution. For its text in English, see http://servat.unibe.ch/icl/ja__indx.html (last visited Jan. 15, 2009).

51 Chang, *supra* note 49, at 130. See also Shoichi, *supra* note 49.
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.\textsuperscript{52}

The postwar Constitution in South Korea shared much of the above instrumental
story in that the Constitution was made very quickly and aimed at primarily declaring
independence and assuring national sovereignty after decades of Japanese
colonization.\textsuperscript{53} The first Constitution was made to declare its independence in 1919
as the Imperial Japan began to annex the Peninsula as its colony. The second
opportunity to make a constitution was after World War II with the Japanese
surrender. But the political situation already led to the North-South divide, and both
made a respective Constitution to declare the Korean independence and pronounced
the sovereignty of the entire Peninsula belong to one Korea.\textsuperscript{54} Thus, the
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 i.e. the Koreans to be free from the previous foreign colonial
power i.e. 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 following years after the war, military governments succeeded
with one anther. They either revised the Constitution or replaced it with a new one,

\textsuperscript{52} Shoichi, \textit{id. See also} Yoichi Higuchi, \textit{The Paradox of Constitutional Revision in Postwar
Japan}, in \textit{FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY} 351-355 (Yoichi Higuchi ed.,
2001).

\textsuperscript{53} Chang, \textit{supra} note 49, at 119-121.

\textsuperscript{54} \textit{Id. See also} Kyong Whan Ahn, \textit{The Influence of American Constitutionalism on South Korea},
22 S. ILL. U. L.J. 71, 72 (1997); Howard S. Levie, \textit{How It All Started—and How It Ended: A Legal Study
Order by the U.S. Secretary of War, in the United States and Korean Problem, S. Doc. No. 83-74).
but in either way, the text of the Constitution stayed pretty much the same and never received any serious attention. The Constitution was taken only at its face value and the act of making or revising it merely indicated the transfers of political powers while sustaining a same Korean people. Only after the democratization of 1987 would the genuine spirit of the Constitution—as a people’s collective decision to securing their own rights and constraining political powers—begin taking hold.

Taiwan’ 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. 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. The Chiang’s troop swiftly seized the island and renamed it as the “Taiwan Province” of the Republic of China (hereinafter ROC) represented by the Kuomintang (Nationalist Party, hereinafter KMT) government. Around the same time, the Constituent Assembly for making the ROC Constitution was about to resume it work that had been disrupted by the war. Notwithstanding strong disapprovals particularly from Governor-General Chen Yi of Taiwan, the newly included Province was allowed to send delegates to participate the making of the ROC Constitution. But because neither the Taiwanese people nor the delegates were provided with information and time for the discussions of the draft Constitution, the presence of the Taiwanese delegates in the Constituent Assembly—seventeen out of fifteen hundreds others—was largely symbolic and

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.

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 worse, the ROC Constitution to Taiwan exhibited a far more instrumental use of the Constitution—to symbolize 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 that was promulgated in 1946 and became effective in 1947 has never been amended. It is now a document of more than sixty years, and the

\(^{57}\) Chang, *id.* at 123.

\(^{58}\) Ma, *supra* note 46, at 214.

\(^{59}\) Chang, *supra* note 49, at 131-133.
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 its 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 of greater constitutional implications. First and foremost were electoral reforms and the second was the recent government reform. While these reforms were also present in other national contexts, the impacts they had on Japan’s constitutional politics were of much greater significance. 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 Councilor would be consisted 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


\(^{61}\) Id.
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 candidate the other to the political party. These electoral changes have exerted great impacts on real politics. As illustrated earlier, in the mid 1990s, the LDP lost its entrenched political dominance, resulting in a larger liberal political atmosphere that gave rise to major electoral reforms. In 2007, the LDP with its alliance was again lost in the election of the House of Councilors. Although the LDP still held tight on the grip over the House of Representatives, certain legislative tensions and even gridlock were already in sight. 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 had loosened the grip. These reforms, success or failure, must be characterized as a velvet revolution to the past entrenched governing structure and power implications without even a word altered 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.

62 This legal change was also litigated in the Court, see Case to seek invalidity of election, 1999 (Gyo-Tsu) No.8, November 10, 1999. For its text in English, see http://www.courts.go.jp/english/judgments/text/1999.11.10-1999-Gyo-Tsu-No.8.html (last visited Jan. 15, 2009)

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

64 Ginsburg et al, supra note 27, at 159-160.

65 OECD, JAPAN: PROGRESS IN IMPLEMENTING REGULATORY REFORM (2004); EUI KAWABATA, CONTEMPORARY GOVERNMENT REFORM IN JAPAN: THE DUAL STATE IN FLUX (2006) (detailing government reforms particularly postal reforms in the 1990s)Kawabata, id.

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 (2002)
South Korea, in contrast with Japan, has had much more times of formal constitutional changes. The Constitution was enacted in July 1948 under the control of the United States Military Government, and subsequently amended eight times till this day.67 Since the last major constitutional revision that gave rise to a genuine constitutional democracy of the sixth Republic in 1987, the Constitution has never been revised. The past constitutional revisions always came in tandem with changes of political regimes. Despite being called as “constitutional revisions” or “constitutional amendments”, they were often referred in real politics 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 has been observed as the original Constitution. Throughout the years various institutional arrangements such parliamentary or presidential system or diffused or centralized judicial review were put into experiment. 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 the many legal scholars, the Constitutional Court that was put into realization in 1988 was really not “a new court” since it had been adopted before.69

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, 16 Korean J. Comp. L. 1, 1-13 (1988) (addressing the actual process of South Korean constitutional amendment).

68 Ahn, id; Kim, id.

69 Ahn, supra note 54; Chong, supra note 30.
Taiwan, similar to South Korea, the 1947 ROC Constitution remains intact despite the many times of 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 what was originally written.\(^71\) If one only reads the main text of the ROC Constitution, one could never correctly know actual functions of the various institutions. For instance, the Council of Grand Justices, a functioning Constitutional Court, was already established in 1948, among some oldest courts in Asia. But its 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 have continuation -if only nominal- 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

\(^{70}\) For detailed discussions of constitutional developments in Taiwan, see Yeh, supra note 10.


\(^{72}\) Bruce Ackerman is one representative among the many. See Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS* (1991). Ackerman however has later revised this view to a certain extent, see Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L. J. 2279 (1999). For a contrasting view,
East Asia, however, sharply contrast with 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.\textsuperscript{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.

\textbf{C. Reactive judicial review exercised with cautions}

Constitutionalism denotes not only rules governed by the Constitution but also a neutral and fair judiciary to ensure rules being followed in such a constitutional scheme. Without effective judicial review, constitutionalism can never be said to take hold. Today, functioning judicial review is very evident in Japan, South Korea and Taiwan. The Supreme Court of Japan, despite a relatively small record of rulings against government actions, has been seen as a very credible institution that facilitates a pluralist democracy.\textsuperscript{74} Constitutional Courts of South Korea and Taiwan have both earned acclaim for their respective judicial activism in steering democratic transitions


\textsuperscript{73} Higuchi, \textit{supra} 52.

\textsuperscript{74} Hasebe, \textit{supra} note 8, at 305-307.
and guarding human rights.\textsuperscript{75} Both courts have on average a record that about one third of its decisions denounced legislative enactments or ruled against government actions ever since the democratization began in the late 1980s.\textsuperscript{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.\textsuperscript{77}

Beneath 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 cautioned. In our view, the three courts are reactive –rather than proactive– to social and political demands and constrained largely by social and political circumstances. Neither court was proactively involved in any social and political agendas of its own initiative, nor ran counter to any majoritarian preferences. 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 been seen as any surprise nor been really characterized as “judicial activism”.\textsuperscript{78} As illustrated in the following, both Constitutional Courts were merely responded to changing social and political demands, and their decisions were backed up by the majority of rising

\textsuperscript{75} See e.g. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (hereinafter Judicial Review) (2003).

\textsuperscript{76} Chang, supra note 11. See also supra not 9.

\textsuperscript{77} See e.g. Ginsburg, supra note 18.

\textsuperscript{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, 97 Colum. L. Rev. 312, 434 (1997). “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?, 73 U. COLO. L REV. 1401 (2002); Keenan D. Kmiec, The Origin and Current Meanings of “Judicial Activism”, 92 Calif. L. Rev. 1441 (2004).
reformist political alliances. In Japan, the social and political situations where the Supreme Court exercises power are very different from the rapidly democratizing circumstances in South Korea and Taiwan. The Japanese Supreme Court must take recognizance of its own institutional integrity, and negotiate with political branches whose democratic legitimacy is not put into doubts by the majority of people, a strong bureaucracy that observes 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 be easily judged as “conservative” even if rarely pronouncing government actions unconstitutional.\(^{81}\) Seen in this way, regardless the number of decisions in striking down statutes, the three courts all reacts to social and political circumstances and the majority demands in a rather cautioned way.

Take the Japanese Supreme Court for example. It rendered less than a dozen of rulings that declared government acts unconstitutional, a significant part of which 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 declared the election in such a mal-apportioned district for House of Representatives as illegal.\(^{83}\) In 1983, a similar challenge was made to an

\(^{79}\) 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 131-133 (1987) (illustrating the Court’s role, while modest, in changing evolving social norms and even environmental ethics.)

\(^{81}\) Upham, id; Hasebe, supra note 8.

\(^{82}\) For a list of these decisions and their details, see Hasebe, id; Beer & Itoh, supra note 8.

\(^{83}\) Kurokawa v. Chiba Prefecture Election Commission (Sup.Ct., G. B., Apr. 4, 1976). For the English translation of this case, see Beer & Itoh, id. at 355-375.
election for the House of Councilors, but the Court admitted no violation of the
Constitution. 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 the district. But recent
decisions in 1999 and 2003 respectively regarding electoral formulas for the
Representatives and Councilors found again no constitutional defiance.

While the line of decisions appears like a pendulum swinging from one side to the other, it is actually not. Rather, the way that these decisions were made was indicative of cautious judicial reactions to social and political circumstances. For, throughout the 1970s, the LDP was faced with domestic and international crises and close to disaster at the polls. The political alliance between the Socialist and Communist Parties was at its strongest. Such an unprecedented political opportunity not only gave rise to toughest challenges at elections and 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

84 Shimiza et al v. Osaka Prefecture Election Commission at al (Sup.Ct., G. B., Apr. 27, 1983). 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, 1994 (Gyo-Tsu) No. 59, Sep. 11, 1996. For the text in English, see http://www.courts.go.jp/english/judgments (last visited Nov. 28, 2008)
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, 1999(Gyo-Tsu)No.8, 1999.11.10. For the text in English, see http://www.courts.go.jp/english/judgments (last visited Nov. 28, 2008). 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, 2003(Gyo-Tsu) No. 15, 2004.01.14. For the text in English, see http://www.courts.go.jp/english/judgments (last visited Nov. 28, 2008).
87 Johnson, supra note 26, at 61-92, 175.
88 Id.
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 House of Councilors- was rendered after 
huge electoral reforms on the electoral method of House of Representatives. While 
clearly expressing the 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. Leaving disputes for further political deliberation, if it 
remains likely, is especially salient in the 1999 and 2004 decisions where newly made 
electoral laws were already put into challenge.

Two recent rulings also echoed this judicial mode that reacted to political and 
social demands while being attentive to political constraints and the majority will. In a 
2005 ruling that held the limitation for Japanese nationals living abroad to 
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 last year, the Court construed 
the Nationality Act in such a way to allow a child born out of wedlock to a Japanese

89 See supra notes 60-64 and accompanying text.
90 Case to seek declaration of illegality of deprivation of the right to vote of Japanese citizens 
residing abroad, 2001 (Gyo-Tsu) No. 82, 2001 (Gyo-Hi) No. 76, 2001. For the text in English, see 
-.No..76%2C.2001.-Gyo-Tsu-.No..83%2C.2001.-Gyo-Hi-.No..77.html (last visited Nov. 28, 2008). See 
also Hasebe, supra note 8, at 303-304.
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.\textsuperscript{91}

South Korea Constitutional Court also exhibits such a reactive but cautioned judicial attitude. On its face, the Court seemed fairly active and at times even aggressive in steering democratizing agenda such as electoral redistricting,\textsuperscript{92} transitional justice\textsuperscript{93} and presidential impeachment.\textsuperscript{94} If examined carefully, however, even in response to some of the most highly contested issues, the Court has rarely directed its decisions against 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 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.\textsuperscript{95} It was a five to four decision. The majority (five) of justices contended

\textsuperscript{91} Case on nationality of a child who born out of wedlock to a Japanese father and a Filipino mother, 2006(Gyo-Tsu) No. 135, 2008.06.04. For the text in English, see http://www.courts.go.jp/english/judgments/text/2008.06.04-.Gyo-Tsu-.No..135-111255.html (last visited Jan. 15, 2008).

\textsuperscript{92} See e.g. National Assembly Election Redistricting Plan Case [13-2 KCCR 502, 2000Hun-Ma92, etc.,(consolidated),October 25, 2001. For the text in English, see http://english.ccourt.go.kr/ (last visited Nov. 28, 2008); Pledge to One-Person One-Vote Case [13-2 KCCR 77, 2000Hun-Ma91, etc.,(consolidated), July 19, 2001. For the text in English, see http://english.ccourt.go.kr/ (last visited Nov. 28, 2008).


\textsuperscript{94} The Impeachment of President (Roh Moo-hyun) Case, 16-1 KCCR 601, 2003 Hun-Ma 814, April 29, 2004. For the text in English, see http://english.ccourt.go.kr/ (last visited Nov. 28, 2008).

\textsuperscript{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.
that the principle of rule of law prohibited ex post facto law and thus part of the Act that allowed the prosecution of crimes beyond statutory limitation must be held unconstitutional.\textsuperscript{96} Constrained by the necessary quorum, however, the Court could not and did not run counter to the political majority’s will.\textsuperscript{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 loosened standard and found the non-prosecution decision not arbitrary.\textsuperscript{98} The second case became moot as the Court agreed a withdrawal by the claimants, President Kim Dae Jung and many others, who were worried about that a disfavoring judicial decision might undermine their parallel efforts at seeking political legislative solution.\textsuperscript{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.\textsuperscript{100}

The case on presidential impeachment conveys similar prudence. Having involved 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

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\textsuperscript{96} See The Special Act on the May Democratization Movement, etc. Case, \textit{supra} note 93.

\textsuperscript{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. \textit{See} Ginsburg, \textit{supra} note 75.

\textsuperscript{98} See December 12 Incident Non-institution of Prosecution Case, \textit{supra} note 93.

\textsuperscript{99} See May 18 Incident Non-institution of Prosecution Decision Case, \textit{supra} note 93.

\textsuperscript{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. \textit{See} in this way, the Court was in fact deliberately allowing the withdrawal, thus leaving space for subsequent political developments and legislation.
the Constitutional Court for final solution. The Court, despite its findings on certain acts by President Roh as in violation of his neutrality obligation or unconstitutional, reached a decision en banc not to impeach the President. It contended that those violations were not grave enough to suffice the standard of gravity, which was not provided in the wordings of relevant provisions and itself a novel judicial invention. Was the judgment of not impeaching President Roh an active judicial action 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, neither of which occupied a single majority. Perhaps tired of reckless political fights, the public support for President Roh was raised substantially after the legislative motion, and even rendered a better electoral turn out for him and his political alliance. 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 – also a consolation to President Roh’s opponents.

101 The Impeachment of President (Roh Moo-hyun) Case, 16-1 KCCR 601, 2003 Hun-Ma 814, April 29, 2004. For the text in English, see http://english.ccourt.go.kr/ (last visited Nov. 28, 2008).

102 See id. See also Youngjae Lee Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective, 53 AM. J. COMP. L. 403 (2005).

103 Facing the internal political struggles, President Roh publicly supported another 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 policy and even pass his impeachment motion. See Kie-Duck Park, Political Parties and Democratic Consolidation in Korea, 2 (1) TAIWAN DEMOCRACY QUARTERLY 23, 33-39 (2005).

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, N.Y. Times, Mar. 13, 2004.

The same line of cautioned judicial actions is found additionally in the cases regarding electoral districting and the removal of the capital. In the former cases,\textsuperscript{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 removal of the capital,\textsuperscript{107} the Court crafted a novel idea of unwritten constitutional customs such as national capital and ruled against the political proposal to remove the capital. The Court might appear to be running political risks but it was certainly very confident of its institutional capacity by knowing that no popular consensus was ever reached on the capital removal and no single powerful political party dominated the congressional platform at the time.

Taiwan’s Constitutional Court also exhibits such a reactive but cautioned line of judicial reasoning. Since democratizing politics was intensively contested, it was no surprise that the Court has been 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 those 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, \textit{Interpretation No. 261}, where the Court ordered senior representatives to leave office and set the deadline for reelection, was such an

\textsuperscript{106} National Assembly Election Redistricting Plan Case [13-2 KCCR 502, 2000Hun-Ma92, etc.,(consolidated),October 25, 2001. For the text in English, see http://english.ccourt.go.kr/ (last visited Nov. 28, 2008); Pledge to One-Person One-Vote Case[13-2 KCCR 77, 2000Hun-Ma91, etc.,(consolidated), July 19, 2001. For the text in English, see http://english.ccourt.go.kr/ (last visited Nov. 28, 2008).

\textsuperscript{107} The Relocation of the Capital City Case, 16-2(B) KCCR 1, 2004 Hun-Ma 554 (consolidated), October 21, 2004. For the text in English, see http://english.ccourt.go.kr/ (last visited Nov. 28, 2008).
example. For a national consensus to undergo large democratization and suspend the old parliament was already reached in the National Affairs Conference. Other examples are Interpretation No. 325, No. 499 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 an elected Vice-President at the same time assuming premiership was at issue, 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 contravene with the Constitution since it has not generated any genuine difficulty in institutional functions. In Interpretation No. 520, the Court was asked whether the executive may unilaterally –without parliamentary consent– suspend the construction of a power plant as promise was made by a newly elected President. The decision was again very ambiguous in terms of which –the executive or the parliament– having a final say.

108 J. Y. Interpretation No. 261 (1990/06/21). For the text in English, see http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.
109 Chang, supra note 11.
110 J. Y. Interpretation No. 325 (1993/07/23). For the text in English, see http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.
111 J. Y. Interpretation No. 499 (2000/03/24). For the text in English, see http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.
112 J. Y. Interpretation No. 419 (1996/12/31). For the text in English, see http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.
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 J. Y. Interpretation No. 520 (2001/01/15). For the text in English, see http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.
Also a recently contested issue, whether an investigation commission on the gunshot before the presidential election of 2004 could be constitutionally organized was brought to the Court. Again, the Court issued a decision stating such a commission could be only constitutionally upheld if exercised as congressional investigation powers.\textsuperscript{114} When the decision was released, no one was sure what the Court really meant 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 cautions to prevent from being regarded as “counter-majoritarian”.

\textbf{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- degrees of protection for such a comprehensive list of rights have at least been written in their respective Constitutions or adopted by way of acceding to international human treaties and transforming them into domestic laws.\textsuperscript{115}

\textsuperscript{114} \textit{J. Y. Interpretation No. 585} (2004/12/15). For the text in English, see http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.

\textsuperscript{115} Both Japan and South Korea ratify the two main human rights treaties, the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR). They both are also members of important second-tier treaties such as the Convention against Torture, the Convention on Rights of Child, and the Convention on Elimination of All Forms of Discriminations against Women, among many others. Because of difficult international status, despite the fact that the ROC was signatory to both ICCPR and
Thus, at least on its face, Japan, South Korea and Taiwan have exhibited great acceptance to fundamental human rights of our times, despite the claim of special “Asian value” made by other authoritarian leaders in East Asia such as ex-Prime Minister Lee Kuan Yew of Singapore. However, to what extent the facial acceptance of human rights values have been put into realization particularly in judicial decisions? Would there be any variations in practice? Would there be any particular emphases over some types of rights to the others? A global alliance of third-world countries often argue that western democracies are biased in emphasizing civil and political rights more than social and economic rights. They insist instead that human needs and hence the protection of economic and social rights are preconditions for constitutional democracies.\footnote{See Stein et al., International Human Rights in Context: Law, Politics & Morals 261-279, 295-312 (3rd ed. 2008).} 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 to 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, right of free association, gender equality, to economic freedom, right of property, labor rights and right to education.\footnote{See supra note 19-21 and accompanying text.} 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. Most recent cases were concerned with the rights to vote of Japanese citizens residing abroad and the right to nationality of a child born out of wedlock with a Japanese father and a foreign mother, indicative of Japanese people’s social situation facing today’s globalization. If examined carefully, the sequence of these cases was quite in tune with social and economic progresses under which those rights claims were made by Japanese citizens. Even those cases that challenged government’s relationship with Shinto were litigated out of initiatives by civil and social groups. Similarly, in South Korea and Taiwan, as the two societies have been undergoing major political changes in tandem with social and economic ones, 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. The Taiwanese Court have also handed similar line of cases.

It is noteworthy to observe cases of the three courts particularly with gender equality. Despite rather patriarchal family tradition, the three courts have all handed down liberal decisions in securing gender equality in family, at work and even in

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, 2001 (Gyo-Tsu) No. 82, 2001 (Gyo-Hi) No. 76, 2001. See supra note 90.
120 Case on nationality of a child who born out of wedlock to a Japanese father and a Filipino mother, 2006(Gyo-Tsu) No. 135, 2008.06.04. See supra note 91.
121 See e.g. Judgment on the enshrinement of a dead SDF officer to Gokoku Shrine, 1982(O)No.902, 1988.06.01; and Judgment upon constitutionality of the prefecture's expenditure from public funds to religious corporations which held ritual ceremonies, 1992(Gyo-Tsu) No.156, 1997.04.02.
122 See e.g. Jiunn-Rong Yeh, Changing Forces of Constitutional and Regulatory Reform in Taiwan, 4 J. CHINESE L. 83, 83-100(1990); Chong, supra note 30.
123 See supra note 20 and accompanying text.
124 For more detailed analysis, see CHANG, supra note 11, at 86-87.
terms of social relationship.\textsuperscript{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 any particular emphasis on citizen’s duty or duty-based interpretation of rights. Instead, it is more often for the three courts to demand state’s duty to protect 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.\textsuperscript{126}

V. 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 from traditional features shared by advanced constitutional democracies particularly in the West. And 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.

\textsuperscript{125} For Japanese cases, see Hasebe, supra note 8. For Korean cases, see Rosa Kim, supra note 20, at 145-162.

\textsuperscript{126} See Steiner et al, supra note 116, at 496-507.
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, the kind of constitutionalism in the three countries embodies basically liberal constitutional structures, enshrining popular sovereignty, placing checks and balances among government powers, and empowering courts to safeguard rule of law and individual rights. Evaluated by typical requirements for (western) constitutionalism such as those developed by Louis Henkin, the three East Asian constitutional democracies have by and large all satisfied those requirements.

Notwithstanding framework commonalities, the East Asian constitutionalism has developed, in contrast with its Western counterparts, into some distinctive features on 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. Second, while most western constitutional jurisprudence develops the idea of constitutionalism as an end in itself, real constitutional experiences in East Asia clearly began with its instrumental value in facilitating modernization. Constitutional institutions were from the start seen as part of state apparatus and only gradually evolve into democratic ones after decades of struggles.

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127 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 See Henkin, supra note 2, at 39-53

128 See supra notes 60-73 and accompanying text.

129 See supra notes 46-59 and accompanying text.
Regarding judicial review power, all three courts—the Supreme Court of Japan and South Korean and Taiwanese Constitutional 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 conciliations between rights with changing social context.  

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

**B. Comparison with transitional constitutionalism**

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130 See supra notes 118-125 and accompanying text.

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.\textsuperscript{132} Two of the constitutional democracies that we observe in the East Asian context belong to the group of new democracies, representing strong resemblance of East Asian constitutional development to transitional constitutionalism.\textsuperscript{133}

In the three East Asian countries, constitutional developments have been 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. And courts have taken significant functions in the flux of political dealings and changes. All these features resemble strongly a transitional nature of constitutionalism in transitional democracies.\textsuperscript{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


\textsuperscript{133} See Yeh & Chang, \textit{supra} note 131 (discussing features and challenges of transitional constitutionalism).

\textsuperscript{134} Id.
Asian context, as a relatively stable market economy had already been in place.\textsuperscript{135} Secondly, the tension between liberal rights and social 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 civil/political rights and social/economic rights in East Asia. Rather, rights have been developed and reaffirmed through social and political progresses, and in South Korea and Taiwan, political rights and labor rights were almost recognized at the same time of political openings.

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 Court, among many others.\textsuperscript{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 dialogues and decisions. Lastly, constitutional developments in the East Asian context have been advanced by individual states without regional or international collaborations. This marks somehow a departure from typical transitional constitutional developments in East and Central Europe that were largely shaped and aided by international and regional communities.\textsuperscript{137} Seen in this way, the commonality displayed by the three constitutional experiences of East Asia seems more intriguing in its intellectual significance.

\textbf{C. Comparison with constitutional discourse shadowed by Asian value}

\textsuperscript{135} See supra notes 24-25 and accompanying text.

\textsuperscript{136} See supra note 132.

\textsuperscript{137} See Jiunn-Rong Yeh & Wen-Chen Chang, supra note 71 (providing four models of constitutional change for new democracies).
In line with the Asian value discourse, East Asian constitutionalism bears certain similar features. For instance, the three courts have rarely demanded citizen’s duty 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 with European constitutional traditions- defies at least with Anglo-Saxon constitutional traditions that convey a much more autonomous concept -and perhaps even reality- of individuals and their relationship with others. The tone that East Asian courts have in stressing 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 way of social solidarity and nation building. That 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. At the same time, however, the empowerment of courts in East Asia has been convincingly explained by accounts that equally apply to other contexts.

Indeed, the development of East Asian constitutionalism has gone far beyond Asian value arguments and to a substantial extent has contradicted with such claims.

138 See supra note 126.
139 See Ginsburg, supra note 18.
140 See Ginsburg, supra note 75 (providing an insurance theory to explain why courts have been empowered particularly in the context of new democracies in Asia).
In defiance with the “state before self” thesis, East Asian constitutional developments have been 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.\textsuperscript{141} Media in Korea, Taiwan and Japan have developed into enjoying an autonomous status with independent operations, gradually creating a public space that is neither state nor market and allowing for open criticism and public deliberation.\textsuperscript{142}

VI. Conclusion

Even up till now, constitutionalism and “East Asia” are still sometimes being taken as paradoxical terms mostly evident in the “Asia value” 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 large amount of constitutional adjudication by the Supreme Court of Japan and the Constitutional Courts of South

\textsuperscript{141} See supra note 125 and accompany text.

\textsuperscript{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, 105 COLUM. L. REV. 1 (2005).
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 Asian value 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.