

Introduction

Asian courts in context: tradition, transition and globalization

JIUNN-RONG YEH AND WEN-CHEN CHANG

The recent rise of Asia in both economic and political power has attracted wide attention.¹ Since World War II, economic development in Asia has surpassed that of many countries in other regions. First was the rapid economic recovery of Japan in the 1960s, followed by the miraculous economic growth of the four Asian tigers or dragons – South Korea, Taiwan, Hong Kong and Singapore – in the 1980s.² This economic miracle has continued into the first decade of the twenty-first century despite the global economic recession. China, India, Indonesia and Thailand, as well as many other Asian states, have become some of the fastest growing economies of the world.³ With the economic decline of the West, the rise of the Asian market has shifted the world's economic center of gravity towards Asia.

Politically, Asia has also undergone profound transformations. An unprecedented number of Asian states have transitioned into constitutional democracies. Japan adopted a postwar democratic constitution in 1946, followed by India in 1949. Following a similar trajectory to that of the West centuries earlier, a strong wave of democratization swept

¹ For scholarly discussions on the rise of Asia, see e.g. F. B. Tipton, *The Rise of Asia: Economics, Society, and Politics in the Contemporary Asia* (University of Hawaii Press, 1998).

² See e.g. P. Krugman, "The myth of Asia's miracle," *Foreign Affairs*, 73(6) (1994), 62–78; R. Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 1990); H. L. Root, *Small Countries, Big Lessons: Governance and the Rise of East Asia* (Oxford University Press, 1996).

³ See e.g. S. Radelet, J. Sachs and J.-W. Lee, "The determinants and prospects of economic growth in Asia," *International Economic Journal*, 15(3) (2001), 1; M. Younis, X. X. Lin, Y. Sharahili and S. Selvarathinam, "Political stability and economic growth in Asia," *American Journal of Applied Sciences*, 5 (2008), 203, 205.

Cambridge University Press

978-1-107-06608-3 - Asian Courts in Context

Edited by Jiunn-rong Yeh and Wen-chen Chang

Excerpt

[More information](#)

over Asia in the late 1980s and early 1990s.⁴ In 1987, both South Korea and the Philippines adopted new constitutions. Mongolia adopted a new constitution in 1992. Taiwan undertook seven rounds of constitutional revisions in the 1990s and 2000s, while Indonesia proceeded with four stages of constitutional reform between 1999 and 2002. Thailand created a new constitution in 1997 and again in 2007.⁵ Among these, some, such as India, Japan, Taiwan and South Korea, have successfully embraced vibrant democracies, while others have continued to face varying degrees of difficulties and challenges.⁶

Political and constitutional reforms also took place in socialist systems. Vietnam adopted a new constitution in 1992. The 1982 Constitution of the People's Republic of China (PRC) was amended in 1988, 1993, 1999 and 2004. As the renowned political scientist Larry Diamond declared in 2008, "More than any other region, Asia will determine the global fate of democracy in the next two to three decades."⁷

The rapid economic development and profound political transitions that have taken place in Asia have inevitably brought about the transformation of the region's legal institutions, and of its courts in particular. In many jurisdictions, courts have been created or reformed in order to cope with fast-growing economies as well as to facilitate the rule of law and protection of individual rights. Over the past few decades, for example, constitutional courts have been created in Taiwan, South Korea, Mongolia, Cambodia, Thailand, Indonesia and Myanmar.⁸ Specialized courts – particularly those with jurisdiction over economic matters concerning tax, bankruptcy, and intellectual property law, among others – have been mushrooming in

⁴ For general discussions on the waves of democratization around the globe, see e.g. S. P. Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press, 1993). For democratization in Asia, see e.g. A. Croissant, "From transition to defective democracy: mapping Asian democratization," *Democratization*, 11(5) (2004), 156, 157; J.-r. Yeh and W.-C. Chang, "The emergence of East Asian constitutionalism: features in comparison," *American Journal of Comparative Law*, 56 (2011), 805, 807.

⁵ D. C. Shin, "The third wave in East Asia: comparative and dynamic perspective," *Taiwan Journal of Democracy*, 4(2) (2008), 91, 99–101.

⁶ For discussion of the causes and difficulties of democratization in Asia, please see J. Lee, "Primary causes of Asian democratization: dispelling conventional myths," *Asian Survey*, 42 (2002), 821–37.

⁷ L. Diamond, *The Spirit of Democracy* (New York: Times Books, 2008), p. 212.

⁸ See the subsequent chapters of South Korea, Taiwan, Mongolia and Thailand. For general discussions of constitutional courts in Asia, see also T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003); W.-C. Chang, K. Y. L. Tan, L.-a. Thio and J.-r. Yeh, *Constitutionalism in Asia: Cases and Materials* (Oxford: Hart Publishing, 2014), pp. 328–42.

Asia.⁹ More importantly, the emphasis on courts and their functions in economic and political developments have led to the undertaking of large-scale judicial reforms aimed at facilitating judicial independence or even democratization of the judiciary. It is not a coincidence that varying degrees of lay participation in courts have been introduced in some Asian jurisdictions, even those with civil law traditions such as Japan, South Korea and Taiwan.¹⁰

Despite this ongoing transformation of courts in Asia, few academic works have provided systematic and contextual analyses of Asian courts and their changing functions.¹¹ How have courts been structured or restructured in response to recent economic and political changes in Asia? Are there distinctive features in the ways that Asian courts are organized and operate? What are the economic, political, social and cultural functions that Asian courts are expected to deliver? In what ways and to what extent are Asian courts different from courts in the West? The main purpose of this book is to provide answers to these key questions that are not yet fully researched and systematically studied in the existing scholarship on Asian courts and their functional dynamics. Fourteen jurisdictions – those of Bangladesh, China, Hong Kong, India, Indonesia, Japan, Malaysia, Mongolia, the Philippines, Singapore, South Korea, Taiwan, Thailand, and Vietnam – are included in this book.

This introduction is divided into five parts. First, we elaborate on the methodology of this book and explain why we adopt an institutional approach to the study of courts and their functional dynamics. Second, we articulate three conceptual dimensions of analysis – tradition and transplantation, transition and construction, and globalization and competition – in order to place the discussion of courts and their functional dynamics into their corresponding contexts. Third, we provide the rationale for the outline and structure of this book. The fourth and fifth parts of this introduction represent key comparative results of the

⁹ See the following discussion of 4.1.5.

¹⁰ See the subsequent chapters: N. Kawagishi, “Towards a more responsive judiciary: courts and judicial power in Japan,” this volume, section 2.2; J. Kim, “Courts in the Republic of Korea: featuring a built-in authoritarian legacy of centralization and bureaucratization,” this volume, section 1.4; W.-C. Chang, “Courts and judicial reform in Taiwan: gradual transformations towards the guardian of constitutionalism and rule of law,” this volume, section 1.2.

¹¹ Recent exceptional efforts include: A. Harding and P. Nicholson (eds.), *New Courts in Asia* (New York: Routledge, 2010); B. Dressel (ed.), *The Judicialization of Politics in Asia* (New York: Routledge, 2012).

fourteen selected jurisdictions in this book. The fourth part addresses comparisons of the structures of courts, judges and their qualifications and appointments, citizens' relationships with the judiciary and their access to justice, and the styles of judicial decisions. The fifth part includes comparisons of the functional dynamics in the fourteen selected jurisdictions along the three analytical dimensions described in the second part: tradition and transplantation, transition and construction, and globalization and competition.

1 Methodology: starting with Martin Shapiro and an institutional approach to courts

While most legal studies focus on legal doctrines and judicial interpretations, a few approaches emphasize courts as an institution and observe their functional dynamics. A pioneer in this approach was Martin Shapiro, whose analysis of courts was published in 1981.¹² Shapiro focused on courts as an institution for legal research, attempting to explore the meaning and function of courts in response to legal systems and social contexts. He initially depicted a prototype of courts prevailing in American society, which consisted of four elements: independence, adversarialism, decision making according to pre-existing rules, and winner-take-all results.¹³ However, through a comparative study of courts in Britain, Imperial China, Western Europe and traditional Islamic societies, Shapiro believed that such an American prototype is just a myth. Most courts have not always reflected such a prototype, and courts in most societies were often used as mechanisms of social control.

Shapiro's study of courts and their functional dynamics has made at least two important contributions to contemporary legal scholarship on courts. First, Shapiro opened up a new institutional approach to courts. Courts and judicial processes have since been viewed as important subjects in legal scholarship. Second, Shapiro departed from a relatively narrow and Western-centered view on courts, pointing out that what matters is the function of courts in different social contexts and political systems.

As a result of Shapiro's work, an increasing number of legal scholars – especially socio-legal scholars – have begun to adopt just such an

¹² M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981), pp. 1–4.

¹³ *Ibid.*

institutional approach and to understand courts as institutions operating in particular political systems and social contexts. Some scholars have focused their attention on the policy-making functions of courts and have even viewed courts as strategic players central to policy-making processes.¹⁴ Others have relied on the principal-agent or related theories and have attempted to delineate the relationship between the courts and the political branches.¹⁵ Still others have elaborated on the attitudes of judges, examining if the personal preferences of judges or other similar factors may affect judicial decisions.¹⁶ Within this body of scholarship, courts are generally understood both as legal institutions and as political institutions interacting with other legal or political institutions and responding to political, economic, social and cultural dynamics. This dynamic understanding of courts has recently become quite popular in the legal discourse of the United States as well as elsewhere.

Context also matters. Inspired by Shapiro's study of courts in various contexts, a number of scholars have begun extending their research beyond the United States, attempting to observe the structures and operations of courts in different social contexts and political systems. For example, John Ferejohn and Pasquale Pasquino have studied the origins and practices of European constitutional adjudication, arguing that judicial review can function well even in civil law systems.¹⁷ Alec Stone has suggested that the Constitutional Council of France has gradually gained public trust as a result of the complex interactions between the Constitutional Council and the political branches.¹⁸ Gretchen

¹⁴ L. Epstein and T. Walker, "The role of the Supreme Court in American society: playing the reconstruction game" in L. Epstein (ed.), *Contemplating Court* (Washington, DC: Congressional Quarterly Press, 1995), pp. 315–46; S. Brenner and H. J. Spaeth, *Stare Decisis: The Alteration of Precedents on the Supreme Court, 1946–1992* (Cambridge University Press, 1995).

¹⁵ J. Brent, "An agent and two principals: U.S. Court of Appeals responses to Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act," *American Politics Quarterly*, 27 (1999), 236–66; D. Songer, J. A. Segal and C. Cameron, "The hierarchy of justice: testing a principal–agent model of Supreme Court–circuit court interactions," *American Journal of Political Science*, 38 (1994), 673–96.

¹⁶ See J. A. Segal and H. J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002).

¹⁷ Ginsburg, *Judicial Review in New Democracies*; S. Issacharoff, "Constitutional courts and democratic hedging," *Georgetown Law Journal*, 99 (2011), 961–1012; J. Ferejohn and P. Pasquino, "Constitutional adjudication: lessons from Europe," *Texas Law Review*, 82 (2004), 1671–704.

¹⁸ A. Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press, 1992).

Helmke and Julio Rios-Figueroa have studied the courts in Latin America, inquiring how institutions, partisan politics and public support may shape the relations of the courts with the political branches.¹⁹ Theunis Roux has studied the Constitutional Court of South Africa and found it to be a pragmatic actor.²⁰ Tom Ginsburg has studied the constitutional courts in new democracies in Asia and developed an insurance theory to explain how constitutional review may be created in the course of turbulent political transition. In a global context, David Caron has studied international courts and tribunals, finding that these courts may shoulder a wide range of political functions.²¹ Neal Tate and Torbjörn Vallinder provide contextualized explanations for the global expansion of judicial power in politics.²² All of these scholars have attempted to uncover the multiple facets of courts in different contexts, which may correspondingly change the functions of courts. For example, recently, Ginsburg and Moustafa have extended the study of courts to the context of authoritarian regimes and found that courts may still exert some influence over politics there.²³

Thirty years have passed since the publication of Shapiro's seminal work. The study of Asian courts and their functional dynamics in response to fast-changing political, economic, social and cultural contexts has been far from abundant. Only recently have there been scholarly publications addressing the creation of constitutional courts or special courts in various Asian jurisdictions.²⁴ It is evident that more contextualized, dynamic and comprehensive studies of Asian courts and their functional dynamics are needed. We hope that this book contributes substantially to the achievement of this important goal.

¹⁹ G. Helmke and J. Rios-Figueroa, *Courts in Latin America* (Cambridge University Press, 2011).

²⁰ T. Roux, "Principle and pragmatism on the Constitutional Court of South Africa," *International Journal of Constitutional Law*, 7 (2009), 106–38.

²¹ D. D. Caron, "Toward a political theory of international courts and tribunals," *Berkeley Journal of International Law*, 24 (2007), 401–23.

²² C. N. Tate and T. Vallinder, "The global expansion of judicial power: the judicialization of politics" in Tate and Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, 1995), pp. 1–10.

²³ See T. Moustafa and T. Ginsburg, "Introduction: the function of courts in authoritarian politics" in T. Moustafa and T. Ginsburg (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008), pp. 1–22.

²⁴ Harding and Nicholson, *New Courts in Asia*; Dressel, *The Judicialization of Politics in Asia*.

2 Asian courts in context: three dimensions

Studying courts in Asia is not an easy task. We must understand the courts as well as “Asia”. In the past, Western scholars often viewed Asia as “exceptional” or “exotic” and therefore either misrepresented Asian societies and their institutions or ignored them entirely. Another common perception of Asia was related to the “Asian values” discourse perpetuated by some Asian political leaders, in which Asian traditions were thought unfit for liberal constitutionalism.²⁵ Asian cultures were understood as valuing the family more highly than the individual, preferring authority over personal freedoms, and emphasizing obligations more than rights.²⁶ The discourse of “Asian values” was even manipulated by some into rhetoric justifying the existence of authoritarian regimes.²⁷ Both views, however, have mistakenly treated “Asia” as a monolithic society, ignoring the diversity and dynamics of such a vast region.

What is the best approach to capturing the diversity and dynamics of Asia and studying Asian courts and their functions without running the risk of over-essentializing “Asia” or the West? We suggest three analytical concepts that are crucial for the study of Asian courts and their functional dynamics: (1) tradition and transplantation, (2) transition and construction, and (3) globalization and competition. We elaborate on these concepts below, and, in the last part of this introduction, we will rely on them to conduct comparative analyses of the functional dynamics of the courts in the fourteen selected jurisdictions.

2.1 Tradition and transplantation

Courts in Asia are neither indigenous nor entirely transplanted from the West. In most cases, Asian courts have developed as a result of rather complex interactions between tradition and foreign transplantations.

One of the traditional functions of courts – dispute resolution – had long existed in various cultures throughout Asia²⁸ but was not always

²⁵ For discussion of how modern constitutionalism developed in East Asia has gradually departed from the Asian values discourse, see Yeh and Chang, “Emergence of East Asian constitutionalism.”

²⁶ Transcript of an interview with Lee Kuan Yew: see F. Zakaria, “Culture is destiny: a conversation with Lee Kuan Yew,” *Foreign Affairs*, 73 (1994), 109, 111. See also K. Engle, “Culture and human rights: the Asian values debate in context,” *New York University Journal of International Law and Politics*, 32 (2000), 291–333.

²⁷ Yeh and Chang, “Emergence of East Asian constitutionalism.”

²⁸ E.g. Shapiro, *Courts*, pp. 160–1.

shouldered by courts in a modern or Western sense of the word. For example, in imperial China, a mayor was expected to exercise all executive, legislative and judicial powers.²⁹ Most Asian jurisdictions established modern legal and judicial systems within the last two or three centuries, and the extent to which their various traditions and cultures may still affect the workings of their modern courts and their functional dynamics is especially intriguing.

The adoption or transplantation of legal institutions is a complex and dynamic process. The direction of transplantation is not always from the West to the East. Nor is it the case that tradition or other contextual factors have no impact on such processes. The present judicial systems in Asia have been asymmetrically influenced by the West through externally imposed colonization, internally triggered modernization, or the consequences of wars, among other forces.³⁰ The sources and directions of these influences are complex. For example, in the late nineteenth century, Japan created a modern judicial system mostly by following Germany's example. Yet the organization and operation of Japan's courts today are dictated by the Constitution it adopted after World War II under pressure from the United States. How these two different sources – in addition to tradition and other contextual factors – may have impacted the Japanese courts has long motivated scholarly inquiry.³¹ Likewise, in Taiwan, the transplantation of legal and judicial systems was quite dynamic and complex, having been shaped by the Chinese imperial system, Japanese colonialism, and modernization, both internally triggered and influenced by the West.³² It is evident that the complexity and dynamics of courts in Asia cannot be fully understood without analysis from the perspectives of both tradition and transplantation.

2.2 Transition and construction

Transition is another key concept in understanding the functional dynamics of Asian courts. In the course of a democratic transition, courts may serve as catalysts for democratization, as facilitator for departing

²⁹ *Ibid.* p. 172.

³⁰ W.-C. Chang, "East Asian foundations for constitutionalism: three models reconstructed," *National Taiwan University Law Review*, 3(2) (2008), 111–41.

³¹ N. Kadomatsu, "Judicial governance through resolution of legal disputes? A Japanese perspective," *National Taiwan University Law Review*, 4(2) (2009), 141–62.

³² Chang, "East Asian foundations for constitutionalism."

Cambridge University Press

978-1-107-06608-3 - Asian Courts in Context

Edited by Jiunn-rong Yeh and Wen-chen Chang

Excerpt

[More information](#)

INTRODUCTION

9

authoritarian rulers or as adjudicators of political conflicts.³³ In a process of economic transition, courts may be keys to economic stability and growth.³⁴

As discussed in the beginning of this introduction, the majority of Asian states have experienced rapid and significant transitions in their political, economic and social systems. These transitions will inevitably continue to affect courts, to varying degrees. Some effects may lead to court reform. Others may – in unexpected and more profound ways – challenge the institutional capacities of courts in these changing contexts. Faced with such unprecedented challenges, Asian courts and judges may need to be innovative in formulating possible solutions.

For example, both South Korea and Taiwan underwent democratization in the late 1980s and 1990s. Both countries' democratization resulted in the empowerment of constitutional courts, particularly for resolving highly contested political disputes.³⁵ In an unexpected turn of events, both constitutional courts had to decide the fates of their countries' top political leadership: the impeachment of President Roh Moo-Hyun of South Korea in 2004 and the criminal investigation of President Chen Shui-Bian of Taiwan in 2007.³⁶ Perhaps not coincidentally, both constitutional courts developed similar strategies to resolve disputes while leaving ample space for political engagement.³⁷ Yet, successful resolutions notwithstanding, both constitutional courts have faced political

³³ A. Trochev, *Judging Russia: Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press, 2008); L. Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press, 2007); S. Issacharoff, "Constitutionalizing democracy in fractured societies," *Journal of International Affairs*, 58 (2004), 73–93; A. Barak, "The role of a supreme court in a democracy," *Hastings Law Journal*, 53 (2002), 1205–16.

³⁴ E.g. L. P. Feld and S. Voigt, "Economic growth and judicial independence: cross-country evidence using a new set of indicators," *European Journal of Political Economy*, 19 (2003), 497–527 (arguing that real GDP growth per capita is positively related to de facto judicial independence); S. Gloppen, R. Gargarella and E. Skaar, "Introduction: the accountability function of the courts in new democracies" in S. Gloppen, R. Gargarella and E. Skaar (eds.), *Democratization and the Judiciary: The Accountability Functions of Courts in New Democracies* (London: Frank Cass, 2004), pp. 1–4.

³⁵ J.-r. Yeh, "Presidential politics and judicial facilitation of political dialogue between political actors in new Asian democracies: comparing the South Korean and Taiwanese experiences," *International Journal of Constitutional Law*, 8(4) (2011), 911–49; W.-C. Chang, "Strategic judicial responses in politically charged cases: East Asian experiences," *International Journal of Constitutional Law*, 8(4) (2010), 885–910.

³⁶ Chang, "Strategic judicial responses."

³⁷ Yeh, "Presidential politics"; Chang, "Strategic judicial responses."

setbacks and challenges to their institutional integrity, such as politicization of the judicial appointment process.³⁸

In China and Vietnam, profound transitions from socialist systems to market economies have occurred. Increasing demands for judicial decisions related to entitlements and rights in the market have triggered large-scale reforms of the legal education and judicial systems.³⁹ Similar reforms have also occurred in other emerging markets, such as Indonesia, Mongolia and Thailand, among others. Courts in Asia are greatly influenced by these transitions and at the same time are expected to take on the resulting challenges. This is the second indispensable dimension for studying the functional dynamics of Asian courts.

2.3 *Globalization and competition*

The third of the dimensions guiding our analysis is that of globalization and the competition it accelerates. Aided by advanced technology and the development of the internet, globalization is mobilizing goods, capital, and even human beings on a global scale at ever increasing speeds.

Global trade, first and foremost, demands conflict resolution mechanisms for international legal disputes. It is no surprise that entry into the World Trade Organization (WTO) often brings about judicial reforms. China's membership in 2001 was the catalyst for both constitutional and judicial reforms in the following decade.⁴⁰ Alternatively, global economic crises may also impact the restructuring of courts and the roles of judges. The 1997 Asian financial crisis, for example, had significant impacts on legal and judicial reforms in South Korea, Thailand and Indonesia.⁴¹ Large-scale financial reforms resulting from

³⁸ Yeh, "Presidential politics"; Chang, "Courts and judicial reform in Taiwan," this volume, section 5.1; Chang, "Strategic judicial responses."

³⁹ W. Gu, "Courts in China: judiciary in the economic and societal transitions," this volume, section 6.1; P. Nicholson, "Renovating courts: the role of courts in contemporary Vietnam," this volume, sections 1, 2.

⁴⁰ C. X. Lin, "A quiet revolution: an overview of China's judicial reform," *Asian-Pacific Law & Policy Journal*, 4 (2003), 255–319; P. Potter, "Legal reform in China: institutions, culture and selective adaptation," *Law & Social Inquiry*, 29 (2004), 465, 473; Gu, "Courts in China," this volume, section 6.1.

⁴¹ M. Kawai and H. Schmiegelow, *Financial Crisis as a Catalyst of Legal Reforms: The Case of Asia* (Tokyo: Asian Development Bank Institute, 2013).