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Constitutional Courts in Asia

Western Origins and Asian Practice

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Whereas law and courts, and to some extent, ideas of the rule of law, have existed in human history for millennia, written constitutions of states only have a history of approximately two centuries, and the earliest constitutional courts were established less than one century ago. The concept and institution of a constitutional court are, thus, relatively new inventions in the legal history of humankind. Yet, in the early twenty-first century, constitutional courts exist and operate in all corners of the world. They are a global phenomenon that deserves scholarly investigation from legal doctrinal, theoretical and comparative perspectives.

In this chapter, we will first trace the origins and evolution of constitutional courts in the Western world and examine the transplantation of this legal or judicial institution to other continents and cultures (Section I of this chapter). The nature, functions and operation of constitutional courts will then be discussed (Section II). Next, we will focus on constitutional courts in East Asia and consider the history, experience and performance of the seven constitutional courts in this part of the world (Section III). Comparative observations on various features of these courts will be made (Section IV). Finally (Section V), we conclude by reflecting on the lessons and implications of the existence and operation of Asian constitutional courts.

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I The Origins, Evolution and Globalization of Constitutional Courts[1]

Since the practice of enacting a written constitution as the supreme and fundamental law of the state began to become popular after American Independence and the French Revolution of the late eighteenth century, thinkers on constitutionalism have grappled with a challenge of institutional design: what kind of political and legal structures should be put in place for the purpose of ensuring that the provisions of the constitution will actually be put into practice. Modern constitutional law has developed various means of 'controls of constitutionality' – means of supervising and guaranteeing the effective implementation of the constitution. A distinction may be drawn between political and judicial controls of constitutionality.[2] Political control of constitutionality is exercised by political or nonjudicial organs of the state, while judicial control is exercised by the judiciary. The principal means of judicial control of constitutionality is judicial review of the constitutionality of legislation enacted by the parliament, or constitutional judicial review.

Since the nineteenth century, two principal models of constitutional judicial review have been developed. They are (a) the American model of 'decentralized' review by ordinary courts,[3] or what Saunders calls 'diffuse review' in Chapter 2, and (b) the Continental European model of 'centralized' review by a specialized constitutional court, or what Saunders calls 'concentrated review'.[4] There also exist mixed or hybrid systems which contain features of both the American and European models. The American model of constitutional judicial review is usually traced back to the legendary decision of the US Supreme Court in *Marbury* v. *Madison*.[5] In his famous judgment in this case, Chief Justice Marshall pointed out that the power of the legislature is limited by the constitution that has been

[1] Sections I and II of this chapter draw upon the author's previous work: Albert H. Y. Chen and Miguel Poiares Maduro, 'The judiciary and constitutional review', in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law* (London: Routledge, 2013) 97–109.

[2] See Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis, IN: Bobbs-Merrill, 1971).

[3] Juliane Kokott and Martin Kaspar, 'Ensuring constitutional efficacy', in Michel Rosenfeld and András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 795–815 at 813–815.

[4] Cappelletti (note 2 earlier). See Chapter 2 (by Saunders) of this volume for a comparative analysis of these two models and their transplantation to Asia.

[5] 1 Cranch 137 (1803).

established by the people; any law made by the legislature that is repugnant to the constitution is void, and it is the power and responsibility of the court to determine what is the applicable legal norm in a particular case where there is a conflict between a statute and the constitution. In the American system of constitutional judicial review that has evolved since *Marbury* v. *Madison*, every court has the power to review whether a statutory provision is unconstitutional and, therefore, void. Standing at the apex of the hierarchy of courts, the US Supreme Court is the final court of appeal in deciding whether any statutory provision is inconsistent with the federal constitution of the United States.

Britain does not have a written constitution, and there is, therefore, no practice of constitutional judicial review.[6] However, colonies in the British Empire had written constitutions which were enacted by the Crown or Parliament in Britain. Under British colonial law, colonial courts had the power to review whether any provision in an enactment of the colonial legislature was *ultra vires* the colonial constitution and, therefore, void.[7] This colonial tradition of constitutional judicial review was inherited by Commonwealth countries such as Canada and Australia. Constitutional judicial review by ordinary courts has also been practised to varying extents in newly independent countries which were formerly parts of the British Empire, such as India, Pakistan, Bangladesh, Sri Lanka and some other common-law countries in Asia and Africa, such as Malaysia and Kenya.

The European model of constitutional judicial review by a specialized constitutional court can be traced back to the Austrian Constitution of 1920, which, under the influence of Hans Kelsen's jurisprudence, established a constitutional court.[8] According to Kelsen's theory of the hierarchy of legal norms, the constitution stands at the foundational level, and the validity of all legal norms in a state is ultimately derived from the

[6] However, under the law of the European Communities (now the European Union), British courts and the European Court of Justice may review and invalidate UK law that is inconsistent with applicable European law. Under the European Convention on Human Rights, the European Court of Human Rights may review the compatibility of UK law with the Convention. Following the enactment by the British Parliament of the Human Rights Act 1998, UK courts may also review the compatibility of UK law with the Convention (as incorporated into the Act), though they may not invalidate such incompatible law.

[7] See generally Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966).

[8] Cappelletti (note 2 earlier) 46–47, 71–72.

constitution. Kelsen proposed the creation of a constitutional court which (unlike ordinary courts) had jurisdiction to determine whether any legal norm was consistent with the constitution. In his view, the constitutional court was the complement to the legislature; it performed a political and legislative function – that of negative legislation, or nullification of an unconstitutional norm. In Kelsen's theory, such constitutional judicial review was limited to dealing with logical inconsistencies between, on the one hand, constitutional norms – particularly norms governing the division of power between various state organs – and, on the other hand, other lower-level legal norms; it was not concerned with the protection of individuals' human rights.[9]

The Austrian Constitutional Court (*Verfassungsgericht*) epitomized the 'archetypal form'[10] of the kind of constitutional judicial review that is (a) centralized, (as distinguished from the decentralized American model in which every court may exercise the power of constitutional review), (b) abstract (i.e., review of the constitutionality of a law but not in the context of the facts and circumstances of any concrete case that is litigated before an ordinary court) rather than concrete (as in the American system or the systems in former British colonies, under which the court reviews the constitutionality of a law only where the application of that law is relevant to a case litigated before the court), and (c) review *principaliter* (i.e., review in a legal action where the principal or only issue is the constitutionality of a law) rather than review *incidenter* (as in the American system or the systems in former British colonies, where the review is only incidental to the making of a judicial decision as to which party wins the litigated case).[11]

In the Austrian system that existed from 1920 to 1929, the constitutional court only conducted abstract review of the constitutionality of laws in actions initiated by other governmental organs for the purpose of such review. In particular, the federal executive could request review of laws of the Länder (constituent states of the federation); the governments of the Länder could request review of federal legislation.[12] Hence the purpose of the system was to police the constitutional division of

[9] See generally Hans Kelsen, 'Judicial review of legislation: A comparative study of the Austrian and the American constitution' (1942) 4 *Journal of Politics* 183; Hans Kelsen, *General Theory of Law and State*, Anders Wedberg (trans.) (New York: Russell, 1961).
[10] Cappelletti (note 2 earlier) 69.
[11] Ibid., 69.
[12] Ibid., 72.

power between the federation and its member states. The Austrian system was modified by the constitutional amendment of 1929, under which the supreme court and central administrative court acquired the right to refer the question of the constitutionality of a law to the constitutional court when such a question arose in cases being tried by them.[13] Thus, an element of concrete review or review *incidenter* was introduced into the Austrian system of centralized review by a constitutional court.

After World War II, major developments in constitutional judicial review occurred in Europe. These developments may be understood in the context of the post-war international movement to enhance the protection of human rights, including the adoption by the United Nations of the Universal Declaration of Human Rights in 1948 and the signature of the European Convention on Human Rights and Fundamental Freedoms in 1950 by member states of the Council of Europe. Both the Basic Law (1949) of West Germany and the new constitution (1947) of Italy provide for the establishment of constitutional courts, which started to operate in these countries in 1951 and 1956, respectively. In France, the constitution (1958) of the Fifth Republic provides for a constitutional council. Constitutional courts were established in Spain and Portugal in 1978 and 1982, respectively, after their transition to democracy. Poland also established a constitutional court, in 1985.[14] Another wave of founding of constitutional courts followed the collapse of communism in the former Soviet Union and Eastern Europe. Since the early 1990s, constitutional courts have been established in most of the new democracies in the former Soviet Union, Eastern Europe and Central Europe.[15] By the early twenty-first century, constitutional courts existed in eighteen of the twenty-seven member states of the European Union.[16]

[13] Ibid., 72–74.

[14] Lech Garlicki, 'Constitutional Court of Poland: 1982–2009', in Pasquale Pasquino and Francesca Billi (eds.), *The Political Origins of Constitutional Courts* (Rome: Fondazione Adriano Olivetti, 2009) 13–39.

[15] See generally Wojciech Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International, 2002).

[16] Víctor Ferreres Comella, 'The rise of specialized constitutional courts', in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011) 265–277 at 265. See generally Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Oxford: Hart, 2014).

In Latin America, the power of constitutional review is exercised by a specialized constitutional court in six countries.[17] Since the 1970s, constitutional courts, or 'constitutional guarantees tribunals', have been established in Chile, Ecuador and Peru.[18] There are no constitutional courts in Mexico, Argentina and Brazil, which have adopted the American system of constitutional review.[19] A hybrid system of constitutional judicial review, in which 'the ordinary courts may have power to refuse to apply an unconstitutional law, but only a single court has the power to declare a law invalid',[20] evolved in the course of the nineteenth century in some Latin American countries, including Venezuela and Columbia.[21] By the early twenty-first century, there were ten Latin American countries in which the supreme court has the power to declare a law unconstitutional and to annul it; in five of these ten countries, there exists a special constitutional chamber in the supreme court.[22]

From its European roots, the institution of constitutional review by a constitutional court has been transplanted to all parts of the world and is now clearly a global phenomenon.[23] In many countries, the founding of a constitutional court is an important indication that the country has chosen the path of constitutional democracy. Examples of countries outside the European and American continents which have established constitutional courts include Turkey, Egypt, Senegal, Ethiopia, South Africa, Zimbabwe, Taiwan (Republic of China), Mongolia, South Korea, Thailand and Indonesia. It is no coincidence that some of these courts were established in the 1980s (in South Korea), 1990s (in Mongolia, South Africa[24] and Thailand) or the first decade of the twenty-first

[17] They are Peru, Guatemala, Chile, Ecuador, Bolivia and Colombia: see Víctor Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (New Haven, CT: Yale University Press, 2009) 5; Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 2nd edn. (New York: Foundation Press, 2006) 493.

[18] Allan-Randolph Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989) 190; Ferreres Comella (note 17 earlier) 5.

[19] Brewer-Carías (note 18 earlier) 128.

[20] Jackson and Tushnet (note 17 earlier) 466.

[21] Brewer-Carías (note 18 earlier) 128, 130.

[22] Jackson and Tushnet (note 17 earlier) 493; Ferreres Comella (note 17 earlier) 5.

[23] See generally Andrew Harding and Peter Leyland (eds.), *Constitutional Courts: A Comparative Study* (London: Wildy, Simmonds & Hill Publishing, 2009).

[24] Since its establishment in 1995, the South African Constitutional Court has played a remarkable role in the democratic transition in South Africa and quickly established its international reputation and importance in comparative constitutional law. See, e.g., James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge: Cambridge University Press, 2016).

century (in Indonesia), at the same time as the countries transitioned from authoritarianism to liberal constitutional democracy, which was also the case in European countries that have undergone such a transition.

II The Nature, Functions and Operation of Constitutional Courts

The core functions of constitutional courts as they originally evolved have been the review of the constitutionality of laws and the adjudication of jurisdictional disputes among different branches, organs and levels of government; the precise boundary between the jurisdiction of a constitutional court and that of ordinary courts in the same legal system is sometimes contested.[25] Contemporary constitutional courts are often given additional functions, such as supervising elections and referendums, determining the legality of political parties and impeaching or enforcing the law against political leaders or senior officials.[26] The nature, functions and operation of a modern constitutional court can be best illustrated by examining the first generation of post-War constitutional courts in Western Europe. We first consider the Federal Constitutional Court (*Bundesverfassungsgericht*, or BVerG), originally of West Germany and subsequently of the united Germany (after 1990).[27] This constitutional court is one of the first constitutional courts in the Western world and has served as a model for many countries which subsequently chose to establish constitutional courts, including several countries in East Asia.

The BVerG consists of sixteen judges divided into two chambers, or senates. Half of the judges are elected by the Bundestag (Federal Parliament), and the other half by the Bundesrat (Council of Constituent States).[28] The types of cases over which the court has jurisdiction include,

[25] See Saunders, Chapter 2 of this volume; Lech Garlicki, 'Constitutional courts versus supreme courts' (2007) 5 *International Journal of Constitutional Law* 44–68.

[26] Ferreres Comella (note 17 earlier) 6.

[27] See generally Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn. (Durham, NC: Duke University Press, 1997); Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Oxford: Hart, 2011) 159–189.

[28] See the Basic Law, Art. 94, which also provides that the court 'shall consist of federal judges and other members.' At least six of the sixteen judges of the court must have served as federal judges. In practice, law professors constitute the largest group of appointees to the court, which is also the case in the Italian and Spanish constitutional

among others, (a) abstract review (upon the request of certain governmental actors, such as the federal government, a state government or one-third of the members of the Bundestag); (b) concrete review, which means that other courts may, in the course of hearing cases, refer to the constitutional court a question regarding whether a statutory provision is unconstitutional; and (c) constitutional complaints (*Verfassungsbeschwerde*)[29] by persons who allege that their basic rights have been violated by governmental actions, including administrative actions and judicial decisions. In practice, most of the cases dealt with by the court arose from constitutional complaints, and most of such complaints were against decisions of other courts. It has been pointed out that the institution of constitutional complaints has contributed to the high standing of the constitutional court in the eyes of members of the public and to the 'rising constitutional consciousness among Germans generally'.[30] Apart from exercising the power of constitutional review of laws and governmental actions, the constitutional court also exercises other powers conferred upon it by the Basic Law and other laws, including the jurisdiction to adjudicate disputes between constitutional organs, between the federal government and a state (Länder) government or between state governments; to handle some electoral matters; to decide on the impeachment of the president of the Republic; and to decide whether a political party is unconstitutional.[31]

The constitutional courts in Italy and Spain are also widely known and influential. The Spanish Constitutional Court has been an exemplar for Latin America, while the mode of appointment to the Italian court has been replicated in several East Asian jurisdictions. The Italian court consists of fifteen judges; Parliament, the president and the judiciary

courts discussed below. See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) 48.

[29] This can also be translated as 'constitutional recourse' (Cappelletti, note 2 earlier) 22. Generally speaking (but subject to exceptions), this remedy can only be pursued when other judicial remedies have been exhausted. The jurisdiction to hear constitutional complaints was not provided in the original Basic Law of 1949 but was first introduced by statute in 1951 and then given constitutional status by the constitutional amendment of 1969.

[30] Kommers (note 27 earlier) 28.

[31] Louis Favoreu, 'Constitutional review in Europe', in Louis Henkin and Albert J. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990) 38–62 at 52; Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951–2001* (Oxford: Oxford University Press, 2015) xxv.

each elect or appoint one-third of them. It has jurisdiction over the review of the constitutionality of laws (including concrete review upon reference by other courts); competence disputes between state organs, between the national and provincial governments and between provincial governments; certain criminal proceedings against the president and ministers; and the acceptance of abrogative referendums.[32] The Spanish Constitutional Court, which began to function in 1980, has twelve judges appointed by the king, four of whom are upon nomination by the congress, four by the senate, two by the government and two by the judiciary. Its jurisdiction includes the review of the constitutionality of laws (including abstract review, upon reference by the president, fifty members of the congress or of the senate, etc., and concrete review upon reference by a court in the course of litigation), the adjudication of conflicts between state organs, the review of the legality of treaties and dealing with individuals' petitions of *amparo* against administrative acts and judicial decisions that affect their fundamental rights.[33] The writ of *amparo* was first developed in Latin America and provides a channel of access to the constitutional court similar to the constitutional complaint in the German system.

One of the basic questions raised by the comparative study of constitutional adjudication is why many European states and new democracies in other parts of the world chose to establish specialized constitutional courts instead of adopting decentralized constitutional review by ordinary courts. In the case of the civil law jurisdictions in Continental Europe, factors which have favoured the option of having a constitutional court include the following:[34] (a) the traditional conception of separation of powers according to which the judiciary (of the ordinary courts) should not engage in the political function of invalidating Acts of Parliament; (b) the absence of a doctrine of *stare decisis* (binding precedents) in civil law countries, which means that if even one court rules that a statute is unconstitutional, the ruling does not bind other courts; (c) the structure (such as the plurality of courts specializing in different kinds of litigation), procedure and mentality and training of judges of ordinary courts are such that they may not be effective in performing the task of constitutional review.

[32] Favoreu (note 31 earlier) 52–53; G. Leroy Certoma, *The Italian Legal System* (London: Butterworths, 1985) 155–157.
[33] Favoreu (note 31 earlier) 54.
[34] Cappelletti (note 2 earlier) 54–66; Jackson and Tushnet (note 17 earlier) 467–468.

In the case of countries undergoing a transition from authoritarianism to democracy, the need to establish a new constitutional court rather than relying on existing ordinary courts to serve as guardians of the new democratic constitution can be particularly acute. Judges of existing courts have served the authoritarian regime in the past; they hardly have the training, skills and experience to meet the challenges of constitutional adjudication, nor can they be trusted to do so.[35] In these circumstances, it may be necessary and desirable to have a new system of constitutional adjudication centred on a new constitutional court that is separate and distinct from the existing judicial system. Furthermore, in a new democracy, the establishment of a new constitutional court can be an important symbol of political and legal progress and of the new era of constitutionalism, rule of law, democracy and human rights, with the new court entrusted with the guardianship, and serving as a focal point, of the new constitutional order.[36] The legitimacy of and public confidence in the new constitutional order will, thus, be enhanced.

Constitutional judicial review, whether by a constitutional court or by ordinary courts led by a supreme court, involves the invalidation of provisions in Acts of Parliament by a court on the grounds that the provisions are unconstitutional. Where this power of review of laws is exercised by a constitutional court rather than an ordinary court, there may even be a built-in tendency or structural pressure towards judicial activism in the exercise of this power.[37] Insofar as the court consists of unelected and elite judges, while Parliament consists of the elected representatives of the people, the institution of constitutional judicial review is apparently undemocratic or counter-majoritarian, and its legitimacy has thus been questioned from time to time.[38] Some jurists defend

[35] Jackson and Tushnet (note 17 earlier) 468; see also Saunders, Chapter 2.

[36] Alec Stone Sweet, 'Constitutional courts', in Michel Rosenfeld and András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 816–830 at 826–827.

[37] Ferreres Comella (note 16 earlier) 271–272: 'The decision by the constitutional framers to establish such special tribunals [constitutional courts] rests, to a significant extent, on their expectation that a sufficiently large number of statutory provisions will be constitutionally problematic in the future. Only under that assumption does it make sense to set up specific institutions in charge of striking down statutes on constitutional grounds.' Kokott and Kaspar (note 3 earlier) at 807 also suggest that '[i]t is safe to assume that the formal existence of a centralized constitutional court tends to at least increase the degree of judicial review.'

[38] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn. (New Haven, CT: Yale University Press, 1986).