

AUTOOCRACY, DEMOCRACY, AND JURISTOCRACY: THE WAX AND WANE OF JUDICIAL POWER IN THE FOUR ASIAN TIGERS

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ABSTRACT

Recent decades have witnessed the expansion of judicial power not only in advanced democracies, but also in nascent democracies and even semi-authoritarian regimes. Conventional wisdom has long held that political competition is the major cause of this trend. Albeit persuasive, this argument cannot explain the nuanced differences between countries in which political powers are equally fragmented or concentrated. Focusing on the development of judicial power in the four Asian Tigers—Hong Kong, Singapore, South Korea, and Taiwan—this Article contends that the judicialization of politics can be better understood through the lens of historical institutionalism. This explains why the judicial power is more progressive in Korea than in Taiwan despite the two countries' political and institutional similarities. It also elucidates why the judiciary in Hong Kong is more active than its counterpart in Singapore.

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I. FOREWORD

Recent decades have witnessed the rapid expansion of judicial power at the expense of the political branches¹ since the mushroom of constitutional tribunals around the globe after the Second World War and, in particular, the fall of the Berlin Wall.² In addition to the power of judicial review, judges nowadays possess other ancillary powers, including, but not limited to, the power to impeach high-rank officials, the power to monitor elections, and even the power to dissolve political parties.³ With the empowerment of the judiciary, judges not only have the final word over constitutional interpretation, but have also stepped into the political arena. This trend of judicialization of politics is so extensive that it is said to have created judge-led government⁴ or

1. See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjom Vallinder eds., 1997).

2. See Andrew Harding et al., *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*, in CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 1, 1-27 (Andrew Harding & Peter Leyland eds., 2009).

3. See NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY 75-97 (2015).

4. See ALEC STONE SWEET, GOVERNING WITH JUDGES 1 (2000) (defining the concept of judicialization as a trend in which “Constitutional judges routinely intervene in legislative process, establishing limits on law-making behavior, reconfiguring policy-making environments, even drafting the precise terms of legislation”); Michael Davis, *A Government of Judges: An Historical Review*, 35 AM. J. COMP. L. 559 (1987).

“juristocracy”⁵ in the sense that judges have intervened in the process of policymaking and other domains that have traditionally been reserved for the political branches. This judicialization of politics reached its zenith in *Bush v. Gore*,⁶ a case in which the Supreme Court of the United States, instead of the people of the United States, essentially granted Bush rather than Gore the presidency of the United States, and which some labeled a constitutional coup launched by five conservative justices.⁷

Although the judicialization of politics has swept the world,⁸ its development is by no means even and varies from one country to another, depending on the sociopolitical environments and institutional designs of each country and idiosyncratic decisions of individual judges.⁹ Apart from these factors, “legal and political developments in the West have in part led to claims that markets promote democracy and rights,”¹⁰ which in turn empower the judiciary—a so-called economic-engagement-rule-of-law process.¹¹ In summary, at the risk of oversimplification, this model suggests that economic prosperity is predicated on, and therefore simultaneously contributes to, judicial independence, because the latter is required to convince foreign investors and boost investment.¹² The model explains why judicial

5. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM I* (2004).

6. See *Bush v. Gore*, 531 U.S. 98 (2000).

7. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1050 (2002).

8. See, e.g., *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* (Javier A. Couso et al. eds., 2010); *THE JUDICIALIZATION OF POLITICS IN ASIA* (Björn Dressel ed., 2012); *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* (Rachel Sieder et al. eds., 2005); GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 41 (2002); Ran Hirschl, *The New Constitution and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 722 (2006).

9. See Diana Kapiszewski et al., *Introduction*, in *CONSEQUENTIAL COURTS I*, 18-30 (Diana Kapiszewski et al. eds., 2013).

10. YASH GHAI, *Rights, Social Justice, and Globalization in East Asia*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 241, 246 (Joanne R. Bauer & Daniel A. Bell eds., 1999).

11. See Gordon Silverstein, *Globalization and the Rule of Law*, 1 INT'L J. CONST. L. 427, 430 (2003) (verifying the concept of economic liberalization that will lead to domestic political and social reform in different countries).

12. See Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES I*, 8-9 (Tom Ginsburg & Tamir Moustafa eds., 2008) (articulating how the judiciary functions in the interests of dictators); Hilton L. Root & Karen May, *Judicial Systems and Economic Development*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra*, at 304-07 (elaborating on the relationship between judicial review and economic development in autocracies).

expansion sometimes takes place in authoritarian regimes seeking to improve their economies; an independent and capable judiciary can stimulate foreign investments by securing investors' freedom of contract and protecting their property from takings without compensation.¹³ Autocrats may also refrain from overruling judicial decisions and instead tolerate judicial independence with an eye to attracting more foreign capital. Once the judiciary is empowered, the argument goes, judicial independence and judicial autonomy in the economic sphere will spill over to other domains, such as human rights protection and political affairs. Sooner or later, economic development will lead to political liberation.

This theory of law and development does not fare particularly well in East Asia.¹⁴ On the one hand, some countries, such as South Korea and Taiwan, both of which experienced exponential economic growth in the 1970s, have achieved similar levels of political liberalization. Their democratization gave birth to active and independent judiciaries that serve as guardians of fundamental rights,¹⁵ which in turn precipitated the judicialization of politics in both jurisdictions.¹⁶ On the other hand, some autocratic governments, such as Singapore, successfully have blocked the spillover effect of judicial independence and remain dictatorships, despite their similar, if not greater, economic growth. Given the diversity and complexity of the East Asian experiences, the relationship between law, politics, and economic development is not crystal clear.

To address this academic lacuna, this Article focuses on the judicialization of politics in the so-called Four Asian Tigers (also known as the Four Asian Little Dragons): Hong Kong, Singapore, South Korea, and Taiwan. Several reasons suggest that comparing these four countries may be illuminating for the study of law and politics. First, all are economically developed Eastern Asian countries that have demonstrated economic miracles in the 1960s-70s, which is why they are dubbed the Four Asian Tigers.¹⁷ Therefore when comparing these

13. Moustafa & Ginsburg, *supra* note 12, at 8-9; Root & May, *supra* note 12, at 304-07.

14. John K.M. Ohnesorge, *Law and Development Orthodoxies and the Northeast Asian Experience*, in LAW AND DEVELOPMENT IN ASIA 9, 16-20 (Gerald Paul McAlinn & Caslav Pejovic eds., 2012).

15. See TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 106-57, 206-46 (2003).

16. For the Korean part, see Jonghyun Park, *The Judicialization of Politics in Korea*, 10 ASIAN PAC. L. & POL'Y J. 62 (2008); for the Taiwanese part, see Chien-Chih Lin, *The Judicialization of Politics in Taiwan*, 3 ASIAN J. L. & SOC'Y 299 (2016).

17. Gary Gereffi, *Rethinking Development Theory: Insights from East Asia and Latin America*, 4 SOC. F. 505, 505-06 (1989).

countries, it is acceptable to exclude the impact of economic development and geographical politics on the judicialization of politics. Second, conventional wisdom has long held that both federalism and huge territory create more room for judicial maneuver because the former spawns vertical agency cost¹⁸ and the latter horizontal.¹⁹ Unlike Brazil, Canada, or China, the four Asian Tigers are unitary, small jurisdictions, whose nature and size reduce agency cost to a significant extent.²⁰ Third, apex courts in all four jurisdictions covered by this Article's analysis are highly trusted and respected, compared with their political counterparts. Judicial popularity among the public is one pivotal element conducive to the judicialization of politics because neither politicians nor the public would turn to unpopular courts and accept their judgments. By controlling for these factors, the analysis, though still imperfect, becomes more reliable.²¹

To be sure, no two countries are exactly the same; in fact, it would not be fruitful to compare two countries with identical conditions. Rather, “[c]omparison is possible only among objects that are, simultaneously and without contradiction, unified and plural.”²² In this regard, these four countries are similar enough in some ways (as mentioned above) to make the comparison meaningful but distinct enough in political and legal institutions to generate insightful findings. To be more specific, the development of judicialization of politics varies considerably in the four jurisdictions,²³ notwithstanding their similar economic development. The four countries can be divided into two

18. An agency cost is a type of cost that arises when the principal hires an “agent” to act on his or her behalf. Because the principal and the agent have different interests and the agent usually has more information and knowledge than the principal, the principal cannot directly ensure that his or her agent is always acting in the principal's best interests. In the context of federalism, the federal government may delegate certain issues to the state government, which may not always follow the federal government's order. Similarly, horizontal agency cost refers to the fact that bureaucracies in peripheral regions may not faithfully obey the order of the central government. For the former, see MARTIN SHAPIRO & ALEX STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 149-51 (2002).

19. See Tom Ginsburg, *The Judicialization of Administrative Governance*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES* 1, 6 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

20. Admittedly, South Korea and Taiwan are clearly larger than Hong Kong and Singapore. The difference is a matter of degree, not of kind.

21. See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 245-53 (2014).

22. Catherine Valcke, *Comparative Law as Comparative Jurisprudence*, 52 *AM. J. COMP. L.* 713, 720 (2004) (using apples and oranges to illustrate the comparability of legal systems).

23. See *infra* Parts I-IV.

camps. In the first camp, South Korea and Taiwan are young and consolidated democracies that adopted the civil law legal system, a legacy of the Japanese Empire. Political competition in the two countries is intense, and both have passed the two-turnover test, meaning that the political power has been transferred peacefully twice.²⁴ In contrast, in the second camp, Singapore and Hong Kong are semi-competitive or competitive authoritarian societies and former British colonies immersed in the common-law tradition. Elections are regularly held, but opposition parties are unlikely to win in the near future. It should come as no surprise that the judicialization of politics is more vibrant in South Korea and Taiwan than in Hong Kong and Singapore because political power is more diffuse in the former two jurisdictions than in the latter two. Nonetheless, this conventional wisdom, albeit true, overlooks the nuanced differences in each jurisdiction's development of judicialization of politics. It does not elucidate, for example, why the judicialization of politics in Hong Kong is more active than in Singapore, even though both are authoritarian societies. Likewise, neither could this conventional wisdom explain why the Constitutional Court in South Korea is more assertive than its Taiwanese counterpart in certain spheres, such as transitional justice.

Although it is difficult to quantitatively measure judicial activism,²⁵ it is possible to evaluate judicial power based on a court's influence over different types of issues. These issues can be divided into three broad categories²⁶: procedural due process of law, policymaking, and mega-politics.²⁷ Each category involves a different level of judicial intervention in political affairs. To illustrate, procedural due process is least politically salient, resting firmly within ordinary court prerogatives. The case of Singapore, in which the judiciary strictly adheres to a thin rather than thick conception of the rule of law,²⁸ is a prime example. Next on

24. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 266-67 (1991).

25. See Tom Ginsburg, *The Global Spread of Constitutional Review*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 81, 94 (Keith E. Whittington et al. eds., 2008) (arguing that "comparative work on variations in performance is hampered by lack of a common metric judicial power One cannot therefore rely on simple strike rates as a metric of success of power").

26. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 *ANN. REV. POL. SCI.* 93, 98-99 (2008).

27. *Id.* at 94 (Mega-politics refers to "matters of outright and utmost political significance that often define and divide whole polities.").

28. The thin rule of law refers to the procedural, rather than substantive, dimension of law, such as predictability, consistency, stability, publicity, practicability, and so on. See Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in *ASIAN DISCOURSES*

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the continuum is policymaking, which carries more political salience. Courts in all four jurisdictions bar Singapore have intervened and substituted their judicial rulings for political agendas. Finally, the most politically powerful courts intervene in mega-politics. Constitutional courts in South Korea and Taiwan fall within this category. Between the two, the South Korean Constitutional Court is more assertive in issues such as transitional justice, a realm in which Taiwan's justices have been prudent if not conservative.

In addition to attaining different categories of judicial intervention, the method of judicialization of politics also varies. Some interventions are launched from above, resulting mainly from the interactions and clashes between political, economic, and judicial elites, and the court judgments that resolve those conflicts;²⁹ others are due to bottom-up grassroots forces, such as legal mobilization and cause lawyering. In some countries, judicialization is stimulated mainly through the top-down path. This is particularly the case when civil society is dormant or the bottom-up support structure³⁰ is weak. In other nations, by contrast, public interest litigation is the major driving force in precipitating judicial intervention when there is political dysfunction or stalemate. Normally, the two approaches go hand in hand with each other in galvanizing judicialization of politics, but this is not necessarily the case. For example, legal mobilization is intense in Hong Kong but absent in Singapore, despite their political and legal similarities.

This Article suggests that the four countries have demonstrated different levels of judicialization of politics and that historical institutionalism³¹ better explains the nuanced differences in the judicialization of politics in countries with similar political and institutional conditions. To solve these puzzles, this Article argues that students of the judicialization of politics should pay more and closer attention to the historical foundation, evolution, and impact of certain institutions. Through the prism of historical institutionalism, the judicialization of politics "is not

OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 1, 2-3 (Randall Peerenboom ed., 2004).

29. HIRSCHL, *supra* note 5, at 43.

30. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 2-6 (1998).

31. See Orfeo Fioretos, *Historical Institutionalism in International Relations*, 65 INT'L ORG. 367, 367 (2011); Peter A. Hall & Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 937-42 (1996).

merely *structured* by institutions but is also *constituted* by them.”³² To be more specific, historical institutionalism elucidates why the judicialization of politics is more progressive in South Korea than in Taiwan, in Hong Kong than in Singapore.

The rest of this Article proceeds as follows. Sections I to IV articulate the emergence and development of the judicialization of politics in the four jurisdictions. The introduction and analysis of each section will focus on the judicialization of politics both from above and from below. Judicialization from above usually starts from the formal expansion of judicial power, followed by a gradual shift of political equilibrium, which is embodied by judicial intrusion into political prerogatives.³³ As regards the latter, attention will be paid to social movements in general and support structures, including government financial aid, public interest lawyers, and rights advocacy groups, in particular. Finally, section V uses a historical institutionalist framework to compare the varying evolution of judicial power in the Four Asian Tigers and analyzes the key institutional elements that have led to differences in judicialization outcome, despite political and institutional similarities among the four nations. In addition, this Article advances some normative arguments distilled from the findings on the issues of legal transplantation, judicial reputation, and East Asian constitutionalism. Section VI concludes.

II. ASYMMETRICAL JUDICIALIZATION OF POLITICS IN HONG KONG

This section will articulate the judicial development in Hong Kong, which this Article refers to as an asymmetrical judicialization of politics. The judicialization of politics in Hong Kong is asymmetrical because it is mainly driven by grassroots movements rather than the government itself, given Beijing’s control of Hong Kong’s political process. The Hong Kong public is well aware of its rights and has repeatedly taken advantage of litigation to pursue its social and political agendas. On the other hand, although the Court of Final Appeal, the top court in Hong Kong, is famous for its independence and probity, its independence has faced serious challenges *vis-à-vis* Beijing in a series of controversies involving the interpretation of the Basic Law. Interestingly, the two diametrically opposed forces are mutually reinforcing; a lack of politi-

32. Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 1, 6 (Cornell W. Clayton & Howard Gillman eds., 1999) (emphasis in original).

33. See HIRSCHL, *supra* note 5, at 169-210.

cal accountability and representation means the public is more likely to turn to the courts for help.

A. *Political Background*

As the last British colony in Asia, Hong Kong was handed over to China on July 1, 1997, and became the Hong Kong Special Administrative Region (HKSAR).³⁴ The end of British rule, however, did not immediately lead to socioeconomic cataclysm, thanks to the Sino-British Joint Declaration in 1984 and the political arrangement of “one country, two systems.”³⁵ The Chinese government assured Hong Kong that, for fifty years, Hong Kong could maintain its lifestyle and enjoy autonomy, except in the domains of national security and foreign affairs, a freedom that is unavailable in other Chinese cities.³⁶ More specifically, neither the city’s common-law system nor its market-oriented capitalism would be changed.³⁷ In addition, English and traditional Chinese, not simplified Mandarin, would continue to be the working languages in Hong Kong.³⁸

Essentially, the post-colonial government structure maintains a separation of powers. Hong Kong is now led by a Chief Executive, who is elected by a small group of Hong Kong elites.³⁹ So far, all Chief Executives have been pro-Beijing persons.⁴⁰ Legislative power is vested in the Legislative Council, comprised of 70 members.⁴¹ Half of them are popularly elected (geographical constituencies); the other half are elected based on professional representation, although only certain occupations and interest groups are eligible to vote (functional Constituencies).⁴² For the popularly-elected half, political competition is real in the sense that there is little violence or vote buying during the electoral

34. See JOHN M. CARROLL, A CONCISE HISTORY OF HONG KONG 181 (2007).

35. See *id.*

36. *Id.* at 186-87.

37. *Id.* at 193.

38. See Kwong Kin Ming & Yu Hong, *Identity Politics*, in HONG KONG UNDER CHINESE RULE: ECONOMIC INTEGRATION AND POLITICAL GRIDLOCK 125, 132 (Yongnian Zheng & Chiew Ping Yew eds., 2013).

39. XIANGGANG JIBEN FA art. 43 (H.K.).

40. See NGOK MA, POLITICAL DEVELOPMENT IN HONG KONG: STATE, POLITICAL SOCIETY, AND CIVIL SOCIETY 34-49 (2007).

41. XIANGGANG JIBEN FA art. 68, annex II (H.K.) (amended by Instruments 3 and 4 on Aug. 28, 2010).

42. *Id.*

process.⁴³ The opposition parties do garner some success in these elections.⁴⁴ Nonetheless, the majority of the Legislative Council's members have always belonged to the pro-Beijing camp, as opposed to the pro-democracy opposition camp, and party turnover has never occurred.⁴⁵ Due to this institutional design and the political reality, the Hong Kong government has never been considered fully representative and accountable to the Hong Kong people.⁴⁶ Instead, it is heavily influenced if not firmly controlled by the Central Government in Beijing. In terms of judicial power, the Court of Final Appeal (CFA) was newly established after the handover and serves as the court of final resort in Hong Kong, subordinate to no other court, including the Supreme People's Court (SPC) in Beijing.⁴⁷ To be precise, the CFA and the SPC are parallel, and neither can review decisions of the other. Furthermore, unlike many other nascent democracies, there is no constitutional court in Hong Kong.

In fact, however, China does have reasons to support judicial independence in Hong Kong, at least to a certain extent. First, Hong Kong has been an economically advanced city since long before the resumption by China, and its continued economic prosperity is a boon not only to Hong Kong, but also to China. To maintain Hong Kong's status as a global financial hub, judicial independence and efficiency are required to protect property rights and the freedom of contract.⁴⁸ Second, China has repeatedly stressed the importance of rule of law in recent years, and the National People's Congress Standing Committee (NPCSC) even marked December 4 as "National Constitution Day" with an eye to enhancing and entrenching the legitimacy of the Chinese Communist Party's reign.⁴⁹ China's respect for judicial independence in Hong Kong evinces its determination to transform itself

43. Cf. STAN HOK-WUI WONG, *ELECTORAL POLITICS IN POST-1997 HONG KONG: PROTEST, PATRONAGE, AND THE MEDIA* 13-15 (2015).

44. See Legislative Council of the H.K.S.A.R., *Precedence Lists of LegCo Members*, <http://www.legco.gov.hk/general/english/members/members.html> (last visited Oct. 26, 2017) (Alvin Yeung, the newly elected member in 2016, is one of the rising stars in opposition parties.); see also WONG, *supra* note 43, at 69-88 (discussing the emergence, development and internal strife of opposition camp).

45. See WONG, *supra* note 43, at 6-7.

46. See MA, *supra* note 40, at 53.

47. XIANGGANG JIBEN FA art. 82 (H.K.).

48. See Yash Ghai, *Themes and Arguments*, in *HONG KONG'S COURT OF FINAL APPEAL* 1, 2 (Simon N. M. Young & Yash Ghai eds., 2014).

49. *National Constitution Day to Shore up Awareness*, CHINADAILY.COM.CN (Dec. 4, 2014), http://www.chinadaily.com.cn/china/2014-12/04/content_19021263.htm.

from a totalitarian regime to one that honors the rule of law. Finally, and perhaps most importantly, Hong Kong serves as a showcase for the “one country, two systems” principle, which allegedly was designed for the integration of Taiwan.⁵⁰ From this angle, judicial independence (together with other political promises) must be respected, at least ostensibly, to promote the one-country-two-systems package with an eye to the peaceful reunification of Taiwan, a constitutional mandate that is expressly prescribed in the preamble of the People’s Republic of China (PRC) Constitution.⁵¹ In sum, these factors incentivize the Chinese government to tolerate judicial independence in Hong Kong insofar as it does not become a subversive base that destabilizes the Chinese regime.

Nevertheless, it is one thing not to interfere with judicial independence; it is quite another to tolerate judicial self-aggrandizement. The Hong Kong judiciary does step into the political arena from time to time in the sense that “courts have also been increasingly called to regulate the conduct of political activities, such as election regulation, organization of political parties, and the procedures for the legislature.”⁵² This judicial encroachment on the prerogatives of the political branches creates not only tension between the judiciary and the HKSAR government, but also wrath from Beijing because it runs the risk of transforming Hong Kong into a subversive base hostile to the Chinese regime. Therefore, given the political atmosphere, the prospect of full-blown judicial independence is bleak.

B. *Judicial Expansion in Hong Kong*

Although Hong Kong courts have exercised the power of judicial review regularly even before the resumption by China, the Basic Law, the quasi-constitutional law in Hong Kong,⁵³ does not plainly grant this review power to the judiciary.⁵⁴ Instead, the judiciary acquired and

50. See SONNY SHIU-HING LO, THE DYNAMICS OF BEIJING-HONG KONG RELATIONS: A MODEL FOR TAIWAN? 40 (2008); *What’s behind the China-Taiwan divide?*, BBC (Dec. 3, 2016), <http://www.bbc.com/news/world-asia-34729538>.

51. XIANFA pmb. (1982) (China).

52. WAIKEUNG TAM, LEGAL MOBILIZATION UNDER AUTHORITARIANISM: THE CASE OF POST-COLONIAL HONG KONG 171 (2013).

53. As to the applicability of the Constitution of the People’s Republic of China in Hong Kong, see H. L. Fu, *Supremacy of a Different Kind: The Constitution, the NPC and the Hong Kong SAR, in HONG KONG’S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION* 97, 100-02 (Johannes M. M. Chan et al. eds., 2000).

54. XIANGGANG JIBEN FA art. 158 (H.K.).

expanded this power through its own judicial decisions, in spite of the opposite original textual intent.⁵⁵ Note that the judiciary in Hong Kong did not create the power of judicial review *ex nihilo*; instead, the “*Marbury* moment”⁵⁶ happened because of the combination of several Basic Law provisions, the judicial practice during the colonial period,⁵⁷ and empowerment via the Bill of Rights Ordinance in 1991.⁵⁸ This process of judicial expansion has largely gone unchallenged and is widely accepted as legitimate. This renders the Hong Kong judiciary the only institution that may exercise the power of judicial review in China, as that power is not granted even to the mainland’s Supreme People’s Court.⁵⁹ The CFA has frequently exercised this power and declared many Hong Kong statutes inconsistent with the Basic Law and therefore void. Unlike apex courts in many other democracies, however, the CFA does not have the final say over the interpretation of the Basic Law. Instead, the CFA defers to the interpretation of the NPCSC, the institution that enacted the Basic Law, and the CFA is expected to seek the NPCSC’s interpretation when necessary to resolve a case that concerns the authority of the Chinese government.⁶⁰

Unfortunately, the jurisdictional boundary between the NPCSC and the CFA is vague and fluid, spawning many political conflicts. In *Ng Ka Lin v. Director of Immigration*,⁶¹ a landmark case involving the right of abode, the CFA argued that it could scrutinize the constitutionality of

55. See Eric C. Ip, *The Politics of Constitutional Common Law in Hong Kong Under Chinese Sovereignty*, 25 WASH. INT’L L.J. 565, 574 (2016).

56. See Johannes Chan, *Basic Law and Constitutional Review*, 37 H.K. L.J. 407, 409 (2007); John Ferejohn, *Judicial Power: Getting It and Keeping It*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 349, 354-57 (Diana Kapiszewski et al. eds., 2013); Martin S. Flaherty, *Hong Kong Fifteen Years after the Handover: One Country, Which Direction?* 51 COLUM. J. TRANSNAT’L L. 275, 284 (2013).

57. Johannes Chan, *Administrative Law, Politics and Governance*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES, *supra* note 19, at 143, 149; Pui Yin Lo, *Hong Kong: Common Law Courts in China*, in ASIAN COURTS IN CONTEXT 183, 209 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015); Stuart Hargreaves, *From the ‘Fragrant Harbour’ to ‘Occupy Central’: Rule of Law Discourse & Hong Kong’s Democratic Development*, 9 J. PARLIAMENTARY & POL. L. 519, 521-27 (2015).

58. Hong Kong Bill of Rights Ordinance, (1991) Cap. 383.

59. See Veron Mei-Ying Hung, *China’s WTO Commitment on Independent Judicial Review*, 52 AM. J. COMP. L. 77, 122 (2004).

60. Johannes Chan, *Hong Kong’s Constitutional Journey, 1997-2011*, in CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY 169, 171 (Albert H.Y. Chen ed., 2014); see also Cora Chan, *Implementing China and Hong Kong’s Preliminary Reference System: Implementing China and Hong Kong’s Preliminary Reference System: Transposability of Article 267 TFEU Principles*, 2014 PUB. L. 642, 657 (2014).

61. [1999] 2 H.K.C.F.A.R. 4 (C.F.A.).

national statutes enacted by the National People's Congress (NPC) and strike them down if they conflict with the Basic Law.⁶² This was a bold and unexpected contention because even the SPC is unable to do so. This decision irritated the Beijing government, and the NPCSC immediately issued an interpretation, overruling part of the CFA's decision at the request of the HKSAR administration.⁶³ In response to the NPCSC's interpretation and Beijing's anger, the CFA caved and issued a clarification,⁶⁴ admitting the freestanding power of the NPCSC to interpret the Basic Law whenever it deems necessary and proper. Despite its decision being overturned in part, the CFA has strived to secure its authority and autonomy vis-à-vis the authoritarian regime in Beijing.

Notwithstanding the backlash to the *Ng Ka Lin* decision, judicial independence is reasonably functional in Hong Kong because the CFA's common-law tradition imbues it with a distinctly unique and non-Chinese edge. The source of Hong Kong's common law includes not only the English common law at the time of the handover, but also common law from other jurisdictions, such as Australia or India. This affords the CFA greater latitude in interpreting cases than the Basic Law alone would imply.⁶⁵ Moreover, the NPCSC does not intervene in judicial decision-making in Hong Kong too frequently. At the time of writing, it has issued only five interpretations, and one of them was requested by the CFA itself.

Other institutional elements also strengthen judicial independence in Hong Kong. First, the Chief Executive appoints judges on the advice of an independent commission composed of local judges, lawyers, and eminent persons from other sectors, and the Central People's Government has little leverage in the process. Also, Article 89 of the Basic Law prescribes life tenure for judges except in extraordinary circumstances.⁶⁶ Furthermore, there are foreign, non-permanent judges from other common-law jurisdictions sitting on the bench and participating in nearly every important case.⁶⁷ These foreign judges contribute to

62. *Id.* at ¶ 110.

63. See Albert H.Y. Chen, *Constitutional Adjudication in Post-1997 Hong Kong*, 15 PAC. RIM L. & POL'Y J. 627, 642 (2006); Simon Marsden, *Regional Autonomy, Judicial Criticism and the 2005 Interpretation*, 36 H.K. L.J. 117, 118 (2006) (reviewing and evaluating how Hong Kong courts have responded to the challenge of "one country, two systems" after British colonization).

64. *Lau Kong Yung v. Director of Immigration*, [1999] 2 H.K.C.F.A.R. 300 (C.F.A.).

65. Ghai, *supra* note 48, at 4.

66. XIANGGANG JIBEN FA art. 89 (H.K.).

67. See Chan, *supra* note 56, at 420; TAM, *supra* note 52, at 69.

judicial activism in Hong Kong in several ways. First, they are highly prestigious and liberal—a reputation that makes their decisions more likely to be accepted and implemented. As foreign judges from other common-law jurisdictions, they are familiar enough with the legal system in Hong Kong on the one hand and aloof from parochialism and local politics on the other. Because of the judges’ expertise and experience in other jurisdictions, they bring fresh judicial dialogue to Hong Kong through the reasoning in their opinions.⁶⁸ This robust constitutional engagement helps to justify and undergird controversial judicial decisions, particularly when there is a disagreement between Hong Kong and Beijing. These elements reduce corruption, increase public legitimacy, and create uniquely “Hong Kong” jurisprudence distinct from that of the mainland, collectively making the judiciary more independent.⁶⁹

Furthermore, the judiciary protects its independence by applying a variety of interpretive methods that reduce confrontation among the judiciary, the political branches, and Beijing. The so-called “remedial interpretation” is one good example. “Remedial interpretation” means that courts interpret a statutory provision in a certain way that may not be fully consistent with the original, yet unconstitutional, legislative intent in order to save the impugned law.⁷⁰ By doing so, the judiciary substantively changes the law under the guise of legal interpretation. Remedial interpretation also reduces antagonism from the political branches because the law is formally kept constitutional. Another approach used to declare a law unconstitutional without overly offending the political branches is to suspend a striking-down order for a short period,⁷¹ leaving more time for legislative revision. The judiciary may also choose to declare only some trivial provisions unconstitutional without nullifying the whole statute.⁷² Finally, the concept of “margin of appreciation” has been imported with something of a twist. In the European Union, it aims to give the member states more discretion

68. The CFA’s decisions are cited by other jurisdictions as well. See Ghai, *supra* note 48, at 22.

69. See TAM, *supra* note 52, at 53.

70. See Ip, *supra* note 55, at 580.

71. See Kemal Bokhary, *The Rule of Law in Hong Kong Fifteen Years after the Handover*, 51 COLUM. J. TRANSNAT’L L. 287, 298 (2013) (offering reviews of Hong Kong’s judicial independence over the past fifteen years, describing the challenges it currently faces and assessing its future); Ip, *supra* note 55, at 581.

72. See Bokhary, *supra* note 71, at 298.

because of different local conditions.⁷³ In Hong Kong, the judiciary invokes this principle when it is reluctant to interfere with the policy-making process.⁷⁴ Given the pressure that Hong Kong judges face, these approaches are crucial to sustain the rule of law without escalating the mutual distrust between the judiciary and the Hong Kong administration, as well as the Chinese government, in an era when the judiciary is frequently engulfed in political gridlock, and the judicialization of politics has become commonplace.

In addition to wielding the power of judicial review, the judiciary also tightens the scrutiny of judicial review, particularly in cases involving human rights. The paradigm shift from the “*Wednesbury* unreasonableness test” to the doctrine of proportionality is telling.⁷⁵ The former test requires the judiciary to respect the discretion of the political branches unless it is evidently unreasonable.⁷⁶ With the increase of human rights cases, Hong Kong judges have gradually, but not entirely, discarded the application of this standard because it is so deferential that it renders judicial review toothless.⁷⁷ Many instead invoke the doctrine of proportionality as a substitute. Because the doctrine of proportionality is essentially a balancing test,⁷⁸ it grants the judiciary more leeway to maneuver, depending on the balance between public interest and individual right in a particular case.⁷⁹

To further distinguish their cases from mainland jurisprudence, Hong Kong judges “have been very receptive to the use of international and comparative materials.”⁸⁰ Statistics have shown that the judiciary has applied transnational laws in more than 500 cases from 1991 to mid-2009.⁸¹ The intensive judicial borrowing, according to the former

73. See Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843-45 (1999); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 909-26 (2005).

74. See Chan, *supra* note 60, at 185; Sir Anthony Mason, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong*, 37 H.K. L. REV. 299, 314 (2007) (discussing how Hong Kong courts invoke foreign law in maintaining and strengthening the rule of law and human rights).

75. See Chan, *supra* note 57, at 158-59.

76. *Id.*

77. *Id.*

78. See AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 340-70 (Doron Kalir trans., 2012).

79. *Id.* at 381-83.

80. Chan, *supra* note 56, at 410.

81. Albert H.Y. Chen, *International Human Rights Law and Domestic Constitutional Law*, 4 NAT'L TAIWAN U. L. REV. 237, 247 (2009) (discussing the internationalization of constitutional law in Hong Kong).

Hong Kong Chief Justice Andrew Li, is of the greatest importance to the survival of the judiciary.⁸² It has become not only a feature of Hong Kong constitutional jurisprudence but also a weapon to resist the encroachment on the rule of law by Beijing.⁸³ By adhering to international human rights regimes, Hong Kong distinguishes itself from the brutal Chinese regime and stresses “two systems” rather than “one country.”⁸⁴ Moreover, transnational decisions are often cited not to justify the conclusion already reached, but to learn from the transnational consensus.⁸⁵ This “internationalization of constitutional law in Hong Kong”⁸⁶ is in stark contrast with the implementation of four-wall theory in Singapore, where foreign and international case law are cited mostly if not exclusively to buttress the pre-determined conclusions of domestic courts.⁸⁷

In exercising its power of judicial review, the judiciary in Hong Kong has tackled some issues that involve the separation of powers, such as the limitation of its own jurisdiction and the requirement of legislative process.⁸⁸ Specifically, the Legal Practitioners Ordinance stipulated that decisions made by the Solicitors Disciplinary Tribunal cannot be appealed to the CFA.⁸⁹ Despite this clear prohibition, the CFA heard an appeal from a Solicitors Disciplinary Tribunal decision and argued that such a restriction on its jurisdiction must pass the scrutiny of judicial review, maintaining that “[t]he limitation imposed must pursue a legitimate purpose and there must be reasonable proportionality between the limitation and the purpose sought to be achieved. These dual requirements will be referred to collectively as ‘the proportionality test.’”⁹⁰ In another case concerning election petition, the Legislative Council Ordinance similarly provided that decisions of the Court of

82. P. Y. Lo, *An International, Consequentialist and Non-Progressive Court: Constitutional Adjudication in Hong Kong*, 2 CITY U. H.K. L. REV. 215, 224 (2010).

83. See Mason, *supra* note 74, at 303.

84. Chan, *supra* note 56, at 445; Chen, *supra* note 81, at 272.

85. Lo, *supra* note 82, at 226; Chen, *supra* note 81, at 273.

86. See generally Chen, *supra* note 81.

87. Li-Ann Thio, *Beyond the “Four Walls” in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore*, 19 COLUM. J. ASIAN L. 428, 461-97 (2006) (analyzing the transnational judicial dialogue in Singapore and Malaysia).

88. *Solicitor v. The Law Society of Hong Kong and Secretary for Justice*, [2003] 6 H.K.C. F.A.R. 570 (C.F.A.).

89. *Id.* ¶ 9.

90. *Id.* ¶ 31.

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First Instance shall be final.⁹¹ Again, the CFA applied the doctrine of proportionality and ruled that denial of the CFA's power of final adjudication was unconstitutional and void.⁹² Similar to what the constitutional court in Taiwan has done in its Interpretation No. 371,⁹³ which will be explained in more detail in the discussion of Taiwan's judicialization of politics, the CFA essentially asserted that the Hong Kong judiciary, rather than the political branches, is the ultimate determiner of its own jurisdiction.⁹⁴

Normally, the regulation of the legislative process is exclusively reserved for the legislature, not only because legislators know better how to design the technical details, but also because it is within the domain of legislative prerogatives. Nevertheless, the boundary has been trespassed in many jurisdictions, and Hong Kong is no exception. In *Leung Kwok Hung v. President of the Legislative Council*,⁹⁵ the CFA encountered the issue of the amenability of legislative processes. The appellant legislator tried to filibuster the legislation because he knew he would be outvoted.⁹⁶ After hours of filibustering, the President of the Legislative Council put an end to the filibuster and closed the debate. As expected, the appellant was outvoted, and the bill became law several days later.⁹⁷ The appellant petitioned the Court, contending that he had a constitutional right to "participate in" the debate and that the President had no authority to end it.⁹⁸ It is noteworthy that the appellant, "the Longhair," is a well-known legislator famous for his radical pro-democratic stance. After consulting other common-law precedents, such as those in the United Kingdom and Australia, the CFA first confirmed that it had the power to hear this case by maintaining that "the courts will exercise jurisdiction to determine the existence of a power, privilege or immunity of [Legislative Council]."⁹⁹ The CFA decided, however, that it would not determine the occasion or the

91. *Mok Charles Peter v. Tam Wai Ho*, [2010] 13 H.K.C.F.A.R. 762, ¶¶ 26, 73 (C.F.A.).

92. *Id.* ¶ 73.

93. J. Y. Interpretation No. 371 (1995) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371.

94. See Albert H.Y. Chen & P. Y. Lo, *The Basic Law Jurisprudence of the Court of Final Appeal*, in HONG KONG'S COURT OF FINAL APPEAL 352, 386 (Simon N. M. Young & Yash Ghai eds., 2014); PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA 214-15 (2015).

95. [2014] 17 H.K.C.F.A.R. 689 (C.F.A.).

96. *Id.* ¶ 6.

97. *Id.* ¶¶ 7-10.

98. *Id.* ¶ 16.

99. *Id.* ¶ 43.

manner of exercise of any such powers and dismissed the appeal.¹⁰⁰ This case effectively embodies the preceding discussion of the CFA, in that CFA in this case actively expanded its jurisdictional scope, while exercising calculated restraint in order to insulate itself from political backlash. This approach is similar to that of Taiwan’s constitutional court in a series of decisions: the scope of legislative powers, privileges, or immunities is within the reach of judicial review, but in general the judiciary will refrain from substantive intervention unless certain fundamental principles are seriously infringed.¹⁰¹

Another example involving judicial intervention in the internal processes of the Legislative Council was the disqualification of two lawmakers who protested and rejected the political framework of “one country, two systems” at their swearing-in ceremony in 2016. In that case,¹⁰² one of the issues was whether the judiciary was able to scrutinize the process of swearing-in and the Chairman’s Legislative Council decisions. The Court of Appeal answered this question in the affirmative and disqualified the two lawmakers.¹⁰³ On July 14, 2017, the judiciary again disqualified another four lawmakers for failing to sincerely take the oath of office.¹⁰⁴ The two disqualification cases suggest that, although the judiciary is willing to intrude into legislative domains, it will be obedient vis-à-vis Beijing in cases involving the “one country, two systems” principle.

C. *Legal Mobilization as the Main Impetus of Judicialization*

Despite all these examples, the judicialization of politics from above is not particularly intense in Hong Kong, compared with South Korea and Taiwan.¹⁰⁵ Part of the reason is that many of the political disputes in Hong Kong involve the relationship between Hong Kong and Beijing, over which the CFA does not have the final say. Thus, the judicialization of politics in Hong Kong results mainly from grassroots momentum, a feature that is not common in other authoritarian societies.

100. *Id.* ¶¶ 44-46, 53.

101. *See infra* Part IV.B.

102. Chief Exec. of H.K. v. Yau Wai Ching, [2017] 1 H.K.L.R.D. 460 (C.A.).

103. *Id.* ¶ 42.

104. Chief Exec. of H.K. v. President of Legislative Council, [2017] 2 H.K.L.R.D. 53 (C.F.I.); *see also* Alan Wong, *Ruling Threatens Hong Kong’s Independence from China*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/world/asia/hong-kong-court-pro-democracy-lawmakers.html?_r=0.

105. *See infra* Parts III, IV.

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Unlike other democracies where the judicialization of politics is mainly driven by politicians, the judicialization of politics in Hong Kong should be attributed to the public to a considerable extent. This was not the case during the early British colonial period, when the Bar and the Bench—that is, the legal elites—were unenthusiastic about engaging with social movements.¹⁰⁶ Since the handover, however, the situation has changed rapidly and dramatically. Many public interest lawyers and rights advocacy groups have turned to the judiciary for help in order to effect social reform. In many high-profile cases, such as the right-of-abode cases, cause lawyers provide enormous aid in legal mobilization. To date, constitutional adjudication has become an important means for people in Hong Kong to pursue their social and political agendas.¹⁰⁷ This process of bottom-up judicialization of politics is referred to as “legal mobilization.”

In fact, human rights cases comprise only 17% of the CFA’s docket, but receive disproportionately high attention among the public,¹⁰⁸ partly because public interest lawyers are involved in many, if not most, of these cases. Hong Kong judges have responded enthusiastically to these public interest cases,¹⁰⁹ particularly by hearing cases regarding human rights enumerated in the Hong Kong Bill of Rights Ordinance and Chapter III of the Basic Law, which incorporates the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. For instance, in *Director of Immigration v. Chong Fung Yuen*,¹¹⁰ a right-of-abode case, one of the controversies was whether the CFA was legally required to refer to the NPCSC for interpretation before granting the right of abode to a child, an issue that had spawned political tension between the NPCSC and the CFA after the *Ng Ka Lin* case discussed above. The CFA refused to do so and granted the right, arguing that it “should adopt the common law approach to interpretation, and do[es] not need to resort to or otherwise take into account any principle or norm of the mainland legal system.”¹¹¹ The CFA has also emphasized that constitutional

106. Carol Jones, *Dissolving the People: Capitalism, Law and Democracy in Hong Kong*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 109, 111 (Terence C. Halliday et al. eds., 2007).

107. See TAM, *supra* note 52, at 20-21.

108. See Simon N. M. Young, *Human Rights*, in *HONG KONG’S COURT OF FINAL APPEAL* 391, 391-92 (Simon N. M. Young & Yash Ghai eds., 2014).

109. See, e.g., Chen, *supra* note 63, at 652-76.

110. *Director of Immigration v. Chong Fung Yuen*, [2001] 4 H.K.C.F.A.R. 211 (C.F.A.).

111. Chen, *supra* note 63, at 648.

interpretation should avoid “a literal, technical, narrow or rigid approach.”¹¹² This time, the NPCSC again criticized the decision,¹¹³ but did not promulgate any official interpretation to further tether the court.

In addition to the right of abode, judicial activism regarding freedom of expression, including free speech and freedom of assembly, is another litmus test for judicial independence. In *Cheng v. Tse Wai Chun*,¹¹⁴ a defamation case, the court adopted a broad definition of “fair comment,” maintaining that bad motive in and of itself does not exclude such defense.¹¹⁵ Chief Justice Li further pointed out that “[t]he Court should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigour.”¹¹⁶ In stark contrast with their Singaporean counterparts, “Hong Kong courts have never silenced criticism of the executive or legislative branches of government, and the law of defamation has never been invoked by government officials against their critics.”¹¹⁷ *Yeung May-wan v. Hong Kong*¹¹⁸ is another politically sensitive case, in which the petitioners belonged to the Falun Gong, a religion that has been strictly prohibited in China since 1999 but is lawfully practiced in Hong Kong.¹¹⁹ Petitioners were accused of obstructing traffic and attacking police officers on duty when they protested in front of the Beijing government’s office in Hong Kong, and were fined and arrested.¹²⁰ Given the identity of the protestors and where they protested, the political overtones and implications of this case cannot be overstated. Despite this pressure, however, both the Court of Appeal and the CFA delivered unanimous opinions in favor of the protestors.

Finally, the judiciary also endeavors to enforce equal protection in various domains, such as the right to vote and education. In *Secretary for Justice v. Chan Wah*,¹²¹ the CFA declared the right to vote for village representatives should be granted to non-indigenous inhabitants as

112. *Id.*

113. PUI YIN LO, THE JUDICIAL CONSTRUCTION OF HONG KONG’S BASIC LAW: COURTS, POLITICS AND SOCIETY AFTER 1997 388-89 (2014).

114. *Cheng v. Tse Wai Chun*, [2000] 3 H.K.C.F.A.R. 339 (C.F.A.).

115. *Id.* ¶ 75.

116. *Id.* ¶ 3.

117. Chen, *supra* note 63, at 659.

118. *Yeung May-wan v. Hong Kong*, [2005] 8 H.K.C.F.A.R. 137 (C.F.A.).

119. Lo, *supra* note 113, at 119.

120. *Yeung May-wan v. Hong Kong*, [2005] 8 H.K.C.F.A.R. 137, ¶ 3 (C.F.A.).

121. *Secretary for Justice v. Chan Wah*, [2000] 3 H.K.C.F.A.R. 459 (C.F.A.).

well.¹²² Accordingly, the government revised the village election system pursuant to the court's decision.¹²³ In another case regarding gender equality, the government preferred boy students in an admission program on the ground that girls mature earlier on average.¹²⁴ The CFA held the scheme inconsistent with equal protection, and the relevant government authority changed the policy in accordance with the ruling.¹²⁵

Many of the abovementioned cases are petitioned by lay people with the assistance of cause lawyers. At first blush, it seems puzzling that civil society in Hong Kong is so vibrant, compared with other semi-authoritarian societies, such as China and Singapore. A combination of structural, institutional, and personal reasons may account for the flourishing of bottom-up judicialization of politics in Hong Kong. For starters, the political environment is the major structural reason that leads to the judicialization of politics. Scholars have suggested that one of the functions of judicial review is to clear political channels in order to protect discrete and insular minorities.¹²⁶ That is, judicial review should not be regarded only as a means used by electoral losers to obstruct democratic will. The judiciary should retreat when political debate is robust and every opinion has a fair chance to be heard. It follows that if political powers are monopolized by a small group of political and economic elites that cannot properly represent the public will, people will try to bring about social change through the judiciary, and bottom-up judicialization of politics thus occurs. This is exactly what has happened in post-colonial Hong Kong.¹²⁷ Both the executive and legislative departments essentially are controlled by the Beijing government, which has detained and prosecuted many public interest lawyers who allegedly undermine social stability and national security in China.¹²⁸ Disappointed by the impasse in the democratization process,¹²⁹ people in Hong Kong have had no choice but to go to courts for help.

122. *Id.* ¶ 55.

123. Chen, *supra* note 63, at 674.

124. Equal Opportunities Comm'n v. Dir. of Educ., [2001] 2 H.K.L.R.D. 690 (C.F.I.).

125. Chen, *supra* note 63, at 674.

126. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7-8 (1980).

127. See TAM, *supra* note 52, at 153.

128. Chris Buckley, *Chinese Authorities Detain and Denounce Rights Lawyers*, N.Y. TIMES (July 11, 2015), <https://www.nytimes.com/2015/07/12/world/asia/china-arrests-human-rights-lawyers-zhou-shifeng.html>.

129. See TAM, *supra* note 52, at 20-23.

Institutionally, the promulgation of the Basic Law and the Bill of Rights Ordinance has provided a solid foundation for the rights revolution.¹³⁰ Remember that the Bill of Rights Ordinance was enacted in 1991 with an eye to protecting human rights in Hong Kong after the Tiananmen Massacre in 1989, in which China slaughtered hundreds of peaceful protestors.¹³¹ The incorporation of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights into the Basic Law also reflects the fear that human rights in Hong Kong would be abused.¹³² Fortunately, this nightmare has not materialized, but the legislative emphasis on human rights has successfully cultivated strong public respect and advocacy for human rights.¹³³ The establishment of the CFA is another pivotal institutional factor that galvanizes more judicialization of politics. For one thing, moving Hong Kong's highest court from London to Hong Kong makes legal mobilization more viable because the apex court is closer to the grassroots people. More importantly, both cause lawyers and the public perceive the CFA as an independent tribunal that can resist the pressure from the political branches (and Beijing). The *Ng Ka Lin* decision, albeit eventually overruled in part, almost immediately consolidated the CFA's status as the guardian of constitutional rights in Hong Kong. Indeed, empirical studies suggest that the CFA rules in favor of citizens as opposed to the government more frequently in human rights cases.¹³⁴ Hence, the bottom-up process of judicialization of politics in Hong Kong is not surprising because the city's institutions and legal culture have incentivized social activists to rely on the judiciary for social reform.¹³⁵

Another critical institution that facilitates bottom-up judicialization of politics is the legal aid program. Because rights litigation is time- and energy-consuming, government funding is a vital pillar of the support structure that sustains legal mobilization.¹³⁶ In Hong Kong, there is no cap on government funding for each individual case, and suits against government agencies are assigned to private-practice lawyers in order

130. See generally EPP, *supra* note 30.

131. Chen, *supra* note 63, at 627.

132. See CAROL A.G. JONES, LOST IN CHINA?: LAW, CULTURE AND IDENTITY IN POST-1997 HONG KONG 50-51 (2015).

133. See Chan, *supra* note 57, at 157; Karen Kong, *Public Interest Litigation in Hong Kong: A New Hope for Social Transformation?*, 3 CIV. JUST. Q. 327, 330-31 (2009).

134. TAM, *supra* note 52, at 80.

135. Chan, *supra* note 57, at 147.

136. See EPP, *supra* note 30, at 2-6.

to prevent governmental manipulation.¹³⁷ Without a pre-determined funding limit, public interest lawyers and petitioners shoulder a lighter financial burden and are assured that their legal advice and assistance is not merely ceremonial or symbolic. Both the legal aid program and public interest lawyers have encouraged and fostered more judicialization of politics. Furthermore, as regards *locus standi*, the judiciary adopts a mixed approach to interpret the standing rule, sometimes loosely.¹³⁸ Therefore, more public interest cases can be heard by the judiciary.

Last, but not least, the composition of judicial personnel also plays a significant role in spurring legal mobilization in Hong Kong, as they are the ultimate decision-makers. Most Hong Kong judges, be they local or foreign, have served on the bench for decades. Deeply influenced by the common-law tradition and constrained by precedents made during the colonial period, they are generally liberal regarding human rights, compared to the political branches controlled by Beijing. Indeed, many of the foreign judges in Hong Kong are invited precisely because they are famous for their liberal stances.¹³⁹ This is by no means a coincidence; instead, it is a deliberate strategy established by the first post-colonial Chief Justice Andrew Li, who spared no effort to maintain the autonomy and independence of the Hong Kong judiciary. These foreign justices have built the reputation of the CFA as an independent and rights-protective tribunal, which in turn has contributed to legal mobilization in Hong Kong.

The role of public interest lawyers cannot be ignored either. Pitting lawyers against the government, public interest litigation is costly to lawyers not only because it is mostly pro bono, but also because it puts lawyers at risk of losing lucrative business. This is particularly so in Hong Kong, where the “[e]conomic pressure of Beijing and its business allies in Hong Kong has made several cause lawyers pay a cost for their activism.”¹⁴⁰ With the closer economic integration between Hong Kong and China over time, the risk is likely to increase.

Regardless of the danger, there are still some brave and experienced cause lawyers who engage actively in social movements. With their

137. See TAM, *supra* note 52, at 131.

138. See Po Jen Yap, *Locus Standi and Public-interest Litigation in Hong Kong: A Comparative Study*, in PUBLIC-INTEREST LITIGATION IN ASIA 35 (Po Jen Yap & Holning Lau eds., 2011).

139. See Lin Feng, *The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future*, in THE CULTURE OF JUDICIAL INDEPENDENCE IN A GLOBALISED WORLD 279, 302 (Shimon Shetreet & Wayne McCormack eds., 2016); TAM, *supra* note 52, at 70.

140. TAM, *supra* note 52, at 133.

advice and assistance, several social groups, such as the Society for Community Organization and Civil Rights for Sexual Diversities, have tried to bring about social change through litigation.¹⁴¹ They have initiated many cases on different topics, including civil, political, and socioeconomic rights. All of these cases are highly controversial and pressing in the context of post-colonial Hong Kong. Take public housing, for example. Despite Hong Kong's economic prosperity, the gap between the rich and the poor is notorious, and millions of people live in public housing.¹⁴² Following the 1997 financial crisis, some tenants petitioned the judiciary, asking the Housing Authority to reduce rent. The CFA ruled that the Housing Authority was free, but not obliged, to reduce rent.¹⁴³ Furthermore, environmental protection is another important issue of public interest litigation. In a case regarding the reclamation of Victoria Harbor,¹⁴⁴ the Hong Kong public questioned the necessity of a reclamation policy that aimed to ease traffic congestion. Rejecting the aforementioned *Wednesbury* test, the CFA required the relevant authorities to reconsider the project.¹⁴⁵ In another case, this one relating to the privatization of public-housing car parks, the CFA again intervened and postponed the policy of the Housing Authority.¹⁴⁶ Although the CFA eventually approved the policy, the implication from the foregoing cases is clear: every government policy is now subject to the gauntlet of judicial review.

One former foreign justice of the CFA has admitted that “[c]onstitutional litigation in Hong Kong has been far more frequent since the handover than ever before.”¹⁴⁷ Meanwhile, longitudinal surveys have pointed out that the judiciary is the most trustworthy institution among the three branches.¹⁴⁸ Disappointed with the government, the public has chosen the courtroom as its battlefield to challenge unwanted

141. *See id.* at 152-67.

142. *See* Chan, *supra* note 56, at 440-41.

143. *See id.*; Albert H. Y. Chen, *Social Movements and the Law in Post-Colonial Hong Kong*, in *SOCIAL MOVEMENTS IN CHINA AND HONG KONG: THE EXPANSION OF PROTEST SPACE* 65, 82 (Khuin E. Kuah & Gilles Guiheux eds., 2009); Anthony B.L. Cheung & Max W.L. Wong, *Judicial Review and Policy Making in Hong Kong*, 28 *ASIA PAC. J. PUB. ADMIN.* 117, 128-30 (2006).

144. For a detailed introduction of civic engagement in this case, see ELIZA W. Y. LEE ET AL., *POLICY MAKING IN HONG KONG: CIVIC ENGAGEMENT AND STATE-SOCIETY RELATIONS IN A SEMI-DEMOCRACY* 23-38 (2013).

145. *See* Kong, *supra* note 133, at 339.

146. *See* Chen, *supra* note 143, at 82-83; Cheung & Wong, *supra* note 143, at 124-27.

147. Bokhary, *supra* note 71, at 294.

148. *See* TAM, *supra* note 52, at 85-86.

policies, and this strategy has garnered some success.¹⁴⁹ Even when the public loses, wide media coverage of public interest litigation has raised people's awareness of their rights.¹⁵⁰ This strategy has rendered the judicialization of politics from below a notable feature of the development of law and politics in Hong Kong.

It is worth noting that judicialization of politics does not necessarily mean courts will always rule progressively and liberally. It simply means that courts become another forum in which the public may effect political reform. For instance, the judiciary in Hong Kong has ruled in favor of the Hong Kong government in several cases of political salience. One such pro-government decision involved the desecration of a national and a regional flag, a typical symbolic-speech case. Citing many foreign precedents, the court upheld the constitutionality of the anti-desecration statute and ruled against the petitioners.¹⁵¹ Furthermore, the court has remained conservative in the domains of economic and social rights, such as minimum wage, public housing, and hospital services, arguing that providing such resources is an aspirational goal, rather than an obligation.

D. *Explaining the Lopsided Judicialization of Politics in Hong Kong*

From the cases mentioned above, there is a dichotomy in the CFA's approach toward cases that involve national sovereignty and those that do not. In the first category of cases, the judiciary is respectful, if not deferential, to the will of Beijing, even in the domain of human rights. For example, recall that the CFA ruled in favor of the government when confronted with a case of national-flag desecration and attempted to assert its authority and limit the impact of the Central People's Government in the *Ng Ka Ling* case, but encountered vehement criticism.¹⁵² The Hong Kong judiciary has therefore been dubbed a consequentialist court,¹⁵³ meaning that it is pragmatic when dealing with sensitive cases. Specifically, the court has become more attuned to the textual meaning and less generous in applying purposive arguments.¹⁵⁴ This cautious approach reduces the likelihood of Beijing launching further assault upon its autonomy. On the other hand, the

149. See Jones, *supra* note 106, at 145.

150. Kong, *supra* note 133, at 343.

151. For more discussion and critique, see Raymond Wacks, *Our Flagging Rights*, 30 H.K. L.J. 1 (2000).

152. *Id.* at 3.

153. Lo, *supra* note 82, at 228.

154. Young, *supra* note 108, at 397-99.

CFA is laudable for its record in the human rights sphere when there is no pressure from Beijing. It has repeatedly intervened in policymaking, suspended government projects, and ruled against the local HKSAR administration. Its decisions are generally in line with public opinion,¹⁵⁵ and it is indeed highly trusted by the public.

This bifurcated attitude reflects the “one country, two systems” principle and contributes to the peculiar development of judicialization of politics in Hong Kong—namely an abundance in bottom-up movement and a relative absence of top-down forces (although the situation is slowly reversing). In many countries, top-down judicialization of politics, resulting mainly from conflicts between political elites or delegation of power from the ruling party, is more prevalent for three reasons. First, politicians are, after all, people who engage in politics every day. Hence, it should not be surprising that most cases of political salience are lodged by politicians. Second, and partly because of the previous factor, politicians usually have direct access to the judicial branch, which makes the judicialization of politics less costly. For example, a minority (at least one third) in congress may vote to petition the constitutional courts directly in South Korea and Taiwan.¹⁵⁶ By contrast, the public must exhaust all available remedies before bringing their cases all the way to the constitutional courts.¹⁵⁷ The judiciary is also more willing to hear cases brought by politicians, not only because their cases are often more urgent, but also due to the special solicitude afforded to members of the political branches out of respect. The role of the Solicitor General of the United States before the U.S. Supreme Court is somewhat similar.¹⁵⁸

Nonetheless, this is not the case in Hong Kong, where the judicialization of politics has taken place mostly through the bottom-up channel. Unlike top-down judicial empowerment that is often consistent with the interests of the ruling party,¹⁵⁹ bottom-up judicialization of politics seeks to overrule existing policies. The bottom-up process therefore directly pits the judiciary against the political branches and may make the judiciary less willing to hear the case, other things being equal.

155. Chen, *supra* note 63, at 682.

156. GINSBURG, *supra* note 15, at 120-24, 218-22.

157. *Id.* at 220.

158. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987); H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

159. See KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 93, 95-98, 101-02 (2007).

Despite the reluctance of the judiciary, bottom-up judicialization of politics continues to blossom in Hong Kong. Several reasons account for this unexpected development. To begin with, there is a paucity of judicialization of politics from above due to the firm control of the pro-Beijing and pro-establishment forces in Hong Kong. Neither the Chief Executive, nor the Legislative Council, is truly and fully accountable to the Hong Kong people, as a result of the indirect election system and functional constituency. Although political competition in the Legislative Council is real, it has not yet threatened the pro-Beijing camp's monopoly on power. As a result, there are no real challengers to the establishment to initiate cases, force concessions, and effect top-down judicial empowerment. Additionally, the minority in the Legislative Council does not have standing to challenge the constitutionality of a law directly. The lack of this mechanism, a pivotal weapon for congressional minorities to challenge the majority¹⁶⁰ in many other countries, further undermines the judicialization of politics from above. Also, following the commonwealth tradition and the practice in China, Hong Kong did not establish a specific constitutional tribunal after the handover.¹⁶¹ *Ceteris paribus*, the existence of a constitutional court, may be beneficial to the top-down judicialization of politics because a constitutional court is less bombarded with constitutionally trivial cases and consequently has a greater capacity to hear and adjudicate elite-level disputes. Moreover, the CFA does not possess ancillary political powers, such as the power to adjudicate impeachment cases and the power to dissolve political parties. The lack of these powers decreases the CFA's ability to step into the political arena. Finally, the agency cost and the level of corruption of the bureaucracy are low in Hong Kong. This reduces the elite's reliance on the judiciary and the volume of cases petitioned to the courts.¹⁶² In sum, all of these structural and institutional factors contribute to the scarcity of the judicialization of politics from above.

By contrast, a plethora of factors have provided rich soil for judicialization of politics from below. As mentioned above, political context plays an important role in shaping Hong Kong's judicialization. Since the handover, many Hong Kong people have endeavored to cultivate a Hong Kong identity that is distinct from the authoritarian nature of the Chinese regime. To distinguish themselves from China, they stress

160. See STONE SWEET, *supra* note 4, at 55 (pointing out that "oppositions judicialize legislative processes in order to win what they would otherwise lose in 'normal', unjudicialized processes").

161. See LO, *supra* note 113, at 3-5.

162. See Moustafa & Ginsburg, *supra* note 12, at 7-8.

judicial independence, the rule of law, and the protection of civil and political rights.¹⁶³ All three features are unavailable in mainland China and are inextricably intertwined with the concept of judicial empowerment. Meanwhile, unsatisfied with the HKSAR government, which is not democratically accountable, the Hong Kong people have no other choice but judicial review to secure their rights.

Whether the judicialization of politics will continue to flourish in Hong Kong hinges on the maintenance of judicial independence in Hong Kong. The prospect, however, does not look bright. Long before the handover, the fear of losing judicial independence had always haunted Hong Kong.¹⁶⁴ The interpretation of the NPCSC in 1999 regarding the Basic Law further compromised the authority and autonomy of the CFA. It created a precedent that implied that the Beijing-controlled NPCSC has unlimited power to issue any interpretation whenever it deems necessary without request by any Hong Kong authority.¹⁶⁵ The clarification by the CFA after the NPCSC's interpretation was issued to placate Beijing and was seen as a surrender to the authoritarian mainland regime.¹⁶⁶ Although some saw it as a "skillful and successful maneuver" because it effectively resolved the "constitutional crisis,"¹⁶⁷ it was an infringement of judicial independence.

In 2011, judicial independence in Hong Kong faced another challenge as a result of the *Congo* case,¹⁶⁸ in which the CFA made its first referral to the NPCSC for an interpretation involving foreign state immunity.¹⁶⁹ Many feared that the CFA would lose its autonomy after acknowledging the NPCSC's authority through this consultation; others contended that the CFA lost nothing because the mechanism for the CFA to request interpretations had been prescribed in the Basic Law since the first day of resumption.¹⁷⁰ The NPCSC issued a fifth and uninvited interpretation on November 7, 2016, disqualifying two legis-

163. See JONES, *supra* note 132, at 10-17.

164. See Lo Shiu Hing, *The Politics of Debate over the Court of Final Appeal in Hong Kong* 161 CHINA Q. 221, 222-27, 239 (2000) (analyzing how the PRC officials have interpreted the Basic Law after the resumption).

165. Lau Kong Yung v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 300 (C.F.A.).

166. JONES, *supra* note 132, at 49-53.

167. Chen, *supra* note 63, at 637.

168. Dem. Rep. Congo v. FG Hemisph. Assoc., [2011] 14 H.K.C.F.A.R. 95 (C.F.A.).

169. *Id.* ¶¶ 500, 523-34; see, e.g., Ip, *supra* note 55, at 589; P. Y. Lo, *The Gateway Opens Wide*, 41 H. K. L.J. 69 (2011).

170. XIANGGANG JIBEN FA art. 158, § 8 (H.K.).

lators-elect who advocated for Hong Kong's independence.¹⁷¹ This interpretation was controversial and resulted in mass protests, not only because it was made without any application from either the judiciary or the HKSAR government, but also because it fundamentally interfered with the democratic process and the will of the Hong Kong people.¹⁷²

To further weaken future prospects of judicial independence in Hong Kong, the Legal Aid Department allegedly has declined to give legal aid in several politically salient cases because of political pressure.¹⁷³ Given that litigation-driven social movements occupy the lion's share of the judicialization of politics in Hong Kong, the independence of the Legal Aid Department is no less important than that of the judiciary. Whether the accusation is real remains to be seen, but it is clear that judicial independence and the future of judicialization of politics are under siege from time to time.

III. THE DE-JUDICIALIZATION OF POLITICS IN SINGAPORE

Singapore represents a paradigmatic case of de-judicialization of politics, in which the judiciary is strictly insulated from political controversies. Although elections are held regularly and publicly, accusations of gerrymandering and violation of voting secrecy have never been pacified completely. Under the ironfisted control of the People's Action Party (PAP), the judiciary is obedient to the political branches, notwithstanding its efficiency and capability in the financial and economic spheres. Hence, it is not surprising that the judiciary is unable to check the political branches substantively or that civil society cannot use litigation as one way to bring about political and social change. The following paragraphs articulate how the government of Singapore successfully thwarts the global trend of judicial expansion.

A. *Political Background*

Singapore, a former British colony, first became a self-governing state within the Commonwealth in 1959 and then joined the Federa-

171. STANDING COMM. NAT'L PEOPLE'S CONG., 全国人民代表大会常务委员会关于《中华人民共和国香港特别行政区基本法》第一百零四条的解释 [INTERPRETATION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS ON ARTICLE 104] (2016), http://www.npc.gov.cn/wxzl/gongbao/2017-02/21/content_2007633.htm.

172. Joyce Ng & Raymond Yeung, *Lawyers in Silent Protest over Beijing Oaths Ruling—Hundreds Join March with Martin Lee Describing Moves as 'a Tank Crashing into the Legal System,'* SOUTH CHINA MORNING POST, Nov. 9, 2016, at C1.

173. TAM, *supra* note 52, at 138.

tion of Malaya in 1963 due to its lack of natural resources and internal security.¹⁷⁴ Within two years, however, it was expelled from Malaysia as a result of a series of racial riots and ethnic conflicts.¹⁷⁵ Specifically, Singapore is predominantly composed of people of Chinese descent with a small number of Malays, although it is surrounded by Muslim-majority countries, such as Malaysia and Indonesia. In fact, one of the flashpoints that resulted in Singapore's exile was whether the Malays in Singapore should receive preferential treatment as they do in Malaysia. Due to this historical development and demographic characteristic, racial harmony has been a concern since Singapore's foundation. Another threat that overshadowed this nascent city-state in the 1950s was the subversion of the communist party. Both concerns regarding racial harmony and communist subversion have had enduring influence upon the development of judicialization of politics in Singapore.¹⁷⁶

Politically, Singapore is a parliamentary state in which the president, who performs mostly ceremonial powers,¹⁷⁷ has been directly elected since the 1993 constitutional amendment.¹⁷⁸ Since Singapore's inception, the People's Action Party has been the dominant political party in Singapore.¹⁷⁹ Indeed, it did not lose a single congressional seat for nearly three decades after the Barisan Sosialis, the pro-communist party, boycotted the general election in 1968.¹⁸⁰ As a consequence, the PAP has institutionalized its hegemonic presence in every corner of society, making it difficult to distinguish the party from the state.¹⁸¹ It follows that the integration of state and party conflates the national interest with the partisan interest. This is not to say that Singapore is a totalitarian regime; on the contrary, elections are regularly and publicly held, although there are some accusations and evidence of gerry-

174. DIANE K. MAUZY & R.S. MILNE, SINGAPORE POLITICS UNDER THE PEOPLE'S ACTION PARTY 3 (2002).

175. *Id.* at 4.

176. See STEPHAN ORTMANN, POLITICS AND CHANGE IN SINGAPORE AND HONG KONG: CONTAINING CONTENTION 53-75 (2009).

177. See GRAHAM HASSALL & CHERYL SAUNDERS, ASIA-PACIFIC CONSTITUTIONAL SYSTEMS 96 (2002); Li-ann Thio, *Lex Rex or Rex Lex: Competing Conceptions of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1, 75 (2002) (discussing whether the rule of law in Singapore is "thin" or "thick").

178. HASSALL & SAUNDERS, *supra* note 177, at 124.

179. See MAUZY & MILNE, *supra* note 174, at 21.

180. *Id.* at 24.

181. *Id.* at 25-26.

mandering and violation of voting secrecy.¹⁸² Recently, the opposition camp has sporadically garnered some success,¹⁸³ but their appearance is symbolic, and party turnover is unlikely in the foreseeable future. The electoral process, in addition to the economic miracle, has further undergirded the legitimacy of the PAP's reign. Under the rule of the PAP, economic growth has skyrocketed in Singapore since the 1970s, and Singapore is now one of the wealthiest countries in the world, thanks to cooperation with multinational corporations.¹⁸⁴

Despite Singapore's marvelous economic performance, the judiciary in Singapore is extremely submissive to the government, particularly after Singapore cut its umbilical cord with the British Empire's Privy Council (the final court provided for all former colonies) in 1994.¹⁸⁵ Compared with other economically advanced countries in East Asia, it is fair to say that de-judicialization of politics is occurring in three ways. First, judicial power in Singapore is not expanding; instead, the scope of judicial review has withered in certain domains.¹⁸⁶ Second, the judiciary is increasingly deferential to the political establishment, particularly in the domains of national security and preventive detention.¹⁸⁷ Methodologically, the judiciary has become more conservative, consulting foreign or international law only when it supports conclusions based on domestic law. Last, the absence of a support structure discourages civil society from bringing more public interest litigation. In a nutshell, it seems that Singapore is resisting the global trend of judicialization of politics that has taken place around the world.¹⁸⁸ The following section explains the de-judicialization of politics in more detail.

182. Specifically, the PAP garnered less than seventy percent of the popular vote in recent decades, but won more than ninety percent of the congressional seats. See ORTMANN, *supra* note 176, at 63; Thio, *supra* note 177, at 47-50; Li-ann Thio, *The Right to Political Participation in Singapore*, 6 SING. J. INT'L & COMP. L. 181, 211-16 (2002). In addition, the rules are extremely skewed in favor of the incumbents. See Gordon Silverstein, *Singapore: The Exception that Proves Rules Matter*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES, *supra* note 12, at 73, 92-97.

183. MAUZY & MILNE, *supra* note 174, at 148-51.

184. *Id.* at 3-5.

185. HASSALL & SAUNDERS, *supra* note 177, at 176-77; Thio, *supra* note 177, at 67.

186. See Ross Worthington, *Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore*, 28 J. L. & SOC'Y 490, 510-11 (2001).

187. See KEVIN Y.L. TAN, *THE CONSTITUTION OF SINGAPORE: A CONTEXTUAL ANALYSIS* 197-200 (2015).

188. See generally TATE & VALLINDER, *supra* note 1.

B. *Judicial Autonomy with Singaporean Characteristics*

According to the Constitution of the Republic of Singapore, judicial power in Singapore is vested in the Supreme Court—comprising the Court of Appeal and High Court—and other subordinate courts.¹⁸⁹ After 1994, the Constitution established the constitutional tribunal, which is responsible for providing advisory opinions concerning the Constitution.¹⁹⁰ So far, the power of the constitutional tribunal has been invoked once, and its existence does not preclude ordinary courts from wielding the power of judicial review.¹⁹¹ Apart from the power of judicial review, the judiciary also wields other ancillary powers,¹⁹² such as the powers to monitor presidential elections and to issue advisory opinions.¹⁹³ Judges of the Supreme Court have tenure until the age of sixty-five,¹⁹⁴ and judicial remuneration in Singapore remains among the highest in the world. Based on these facts, the judiciary, which is internationally acclaimed for its independence and probity,¹⁹⁵ should not be particularly weak vis-à-vis the coordinate branches of government.

Nevertheless, the judiciary is well known for its obedience to the government and seldom checks the political branches.¹⁹⁶ Several reasons elucidate the gap between judicial power expected in theory and what exists in reality. First, some rights and issues are excluded from the purview of judicial review. Due to the lack of natural resources, for example, Singapore's founders believed government intervention was crucial to economic prosperity at the founding stage.¹⁹⁷ Knowing that the protection of property rights would hamper its power to expropriate private land for public use,¹⁹⁸ the Singaporean government intentionally deleted the right of property from the bill of rights when it seceded from Malaysia, although Singapore is now famous for its status as an international trade hub.¹⁹⁹ This by no means suggests that

189. CONST. OF THE REPUBLIC OF SINGAPORE July 1, 1999, art. 93.

190. See TAN, *supra* note 187, at 34.

191. See *id.*

192. See GAROUPA & GINSBURG, *supra* note 3, at 75-97.

193. CONST. OF THE REPUBLIC OF SINGAPORE July 1, 1999, arts. 93A, 100.

194. *Id.* art. 98(1).

195. See Thio, *supra* note 177, at 6.

196. See, e.g., Lynette J. Chua & Stacia L. Haynie, *Judicial Review of Executive Power in the Singaporean Context, 1965-2012*, 4 J. L. & CTS. 43, 44-45 (2016) (arguing empirically that courts retain autonomy only in cases irrelevant to the government's developmental and political agenda).

197. See MAUZY & MILNE, *supra* note 179, at 3-4.

198. See TAN, *supra* note 187, at 192-96.

199. See *id.* at 194-96.

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property is not legally protected in Singapore. In fact, Singapore's judiciary is famous for its efficiency and neutrality in cases regarding foreign trade and international investment.²⁰⁰ Nevertheless, without a constitutional guarantee of the right to property, the judiciary has been reluctant to intervene in some politically sensitive controversies, such as eminent domain, an issue that has elicited a myriad of high-profile cases around the globe.²⁰¹

Due to historical and political developments, such as the looming racial riot or communist subversion mentioned above, issues regarding religion and national security are essentially immune from judicial surveillance. This judicial deference was not constant in the past.²⁰² Specifically, most cases regarding national security and social stability concern the constitutionality of the Internal Security Act. In 1971, the Court of Appeal ruled in *Lee Mau Seng v. Minister for Home Affairs*²⁰³ that, inter alia, the substantive part of a detention order was insulated from judicial scrutiny.²⁰⁴ In *Chng Suan Tze v. Minister of Home Affairs*, a similar case in 1988, however, the Court of Appeal quashed the detention orders against the appellants on procedural grounds.²⁰⁵ Although the Court averred that it would not second-guess the substantive judgment of the government regarding national security, it stated that the government must show that its decision was indeed predicated on national security justifications.²⁰⁶ It thereby overruled the 1971 decision, rejected the argument that certain issues are non-justiciable, and declared the detention in question illegal.²⁰⁷ Singapore's government was exasperated by this ruling and immediately rewrote the Internal Security Act, "severely truncating the judicial role in relation to detention orders."²⁰⁸ Unsurprisingly, judicial rulings after this revision

200. Li-ann Thio, *The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Commission*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION* 7, 16 (Li-ann Thio & Kevin Y.L. Tan eds., 2009).

201. *E.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005).

202. Li-ann Thio, *Protecting Rights*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION*, *supra* note 200, at 193, 211-15.

203. *Lee Mau Seng v. Minister for Home Affairs*, [1971] SLR(R) 135 (Sing.).

204. *See id.* at 136-37; Michael Hor, *Constitutionalism and Subversion: An Exploration*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION*, *supra* note 200, at 276, 284.

205. *Chng Suan Tze v. Minister of Home Affairs*, [1988] SLR(R) 525, 526-28 (Sing.).

206. *See Hor*, *supra* note 204, at 277-81.

207. *See id.* at 277; Li-ann Thio, *An "i" for an "I": Singapore's Communitarian Model of Constitutional Adjudication*, 27 H.K. L.J. 152, 166-67 (1997).

208. Thio, *supra* note 177, at 58.

switched back to the prior stance of non-justiciability.²⁰⁹

Religious issues usually overlap with racial controversy in Singapore because the Malays, who are mostly Muslims, are both a religious and an ethnic minority in Singapore.²¹⁰ Hence, although Singapore embraces secularism, its constitution clearly prescribes that the government should protect and promote Malay political, educational, religious, economic, social, and cultural interests and the Malay language.²¹¹ Given Singapore's history of racial and religious conflicts, Singapore's parliament passed the Maintenance of Religious Harmony Act,²¹² which stipulates that all executive orders and decisions made under the act shall be final and shall not be called into question in any court.²¹³ The elimination of judicial review in the domain of certain human rights further constrained expansion of judicial power and judicial popularity in Singapore.²¹⁴

In addition to legislative revision, the PAP government also amended the Constitution to isolate certain domains from the gauntlet of judicial review. Article 149 of the Constitution, the so-called Singaporean "notwithstanding clause," is one example.²¹⁵ The notwithstanding clause is a legal concept prevalent in Canada and other commonwealth countries that adopt a distinct model of constitutionalism.²¹⁶ At the risk of oversimplification, it means that the judiciary does not have the final word over constitutional interpretation, and the legislature may override certain judicial mandates.²¹⁷ In other words, judicial supremacy in the U.S. sense does not exist. A notwithstanding clause aims to encourage dialogue among the judiciary and its coordinate branches and ease the counter-majoritarian difficulty that allegedly plagues strong-form judicial review. After the aforementioned *Chng Suan Tze* decision, the PAP government amended the Constitution and inserted a similar

209. *See id.* at 58-60.

210. *See generally* Jaclyn Ling-Chien Neo, *The Protection of Minorities and the Constitution: A Judicious Balance?*, in *EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION*, *supra* note 200, at 234, 234-59; C. L. Lim, *Race, Multi-cultural Accommodation and the Constitutions of Singapore and Malaysia*, 2004 SING. J. LEGAL STUD. 117 (2004).

211. CONST. OF THE REPUBLIC OF SINGAPORE July 1, 1999, art. 152(2).

212. Maintenance of Religious Harmony Act, (Cap. 167A, 2001 Rev. Ed.) (Sing.).

213. *Id.* § 18; *see TAN, supra* note 187, at 175-77.

214. *See TAN, supra* note 187, at 175-77.; Thio, *supra* note 202, at 194.

215. CONST. OF THE REPUBLIC OF SINGAPORE July 1, 1999, art. 149; *see Thio, supra* note 177, at 59.

216. *See generally* STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013).

217. *See Thio, supra* note 202, at 229-30.

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clause, stipulating that parliament may disregard the protection of liberty, equality, freedom of movement, freedom of expression, and the prohibitions against banishment and retrospective laws when social stability is threatened.²¹⁸

The exclusion of judicial review from certain spheres through constitutional amendments introduces another factor detrimental to the development of judicialization of politics—the malleability of a constitution. In Singapore, the Constitution is flexible and subject to revision from time to time, having been amended more than thirty times.²¹⁹ Although every proposed revision requires a supermajority to pass, the hurdle is not particularly arduous for the PAP to overcome. As a result, Singapore's is one of the most frequently amended constitutions in Asia.²²⁰ Generally speaking, the easier it is to amend a constitution, the less powerful the judiciary may become. First, the legislature may circumvent or even overrule the judiciary by amending the constitution directly. As a result, judicial independence becomes an illusion because the judiciary is at the mercy of the political branches. The “constitutional space” of the judiciary is narrower because politicians do not rely on the judiciary to solve thorny issues.²²¹ Second, the “value” of a judicial decision decreases dramatically for interest groups because it can be overturned by the nation's congress. It follows that social reformers will spend less time and money on litigation.

In those countries where the judicialization of politics does emerge, it usually takes place through judicial control over political disputes, heightened scrutiny of executive discretion, and judicial intervention in policymaking and mega-politics.²²² None of these has occurred in Singapore. In the past, the judiciary in Singapore was not so submissive to the political branches. In 1996, for instance, the Court of Appeal cited a precedent delivered by the Privy Council in 1980, maintaining that constitutional provisions should be construed liberally and avoid

218. CONST. OF THE REPUBLIC OF SINGAPORE July 1, 1999, art. 149(1); see Stephen McCarthy & Kheang Un, *The Rule of Law in Illiberal Contexts*, in *POLITICS AND CONSTITUTIONS IN SOUTHEAST ASIA* 315, 318-21 (Marco Bünte & Björn Dressel eds., 2016); Silverstein, *supra* note 182, at 78-79.

219. See LEGISLATIVE HISTORY: CONST. OF THE REPUBLIC OF SINGAPORE, <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=f4f30e87-8039-4143-9a4f-3e801c340e25;page=0;query=DocId%3A%22cf2412ff-fca5-4a64-a8ef-b95b8987728e%22%20Status%3Ainforce%20Depth%3A0;rec=0> (last visited Oct. 15, 2017).

220. See Comparative Constitutions Project, *Timeline of Constitutions*, <http://comparativeconstitutionsproject.org/chronology/> (last visited Sept. 24, 2017).

221. See Gordon Silverstein, *Globalization and the Rule of Law: “A Machine that Runs on Itself?”*, 1 INT'L J. CONST. L. 427, 442-43 (2003).

222. See generally HIRSCHL, *supra* note 5.

the “austerity of tabulated legalism.”²²³ As time goes by, however, the balance has been tipped in favor of the government as the PAP has gradually monopolized all political powers. Moreover, the Singaporean judiciary has not followed the economic-engagement-rule-of-law model.²²⁴ Rather than spurring judicial activism, economic prosperity has reinforced the dictatorship of the PAP government.

Part of the reason for this unexpected result is that, in authoritarian regimes like Singapore, the judiciary is unable to fulfill the functions critical to the judicialization of politics. To be specific, disagreements among different factions in the PAP are resolved within the party rather than through litigation.²²⁵ The judiciary therefore has little opportunity to step into the political arena and build its reputation as an arbiter of political conflicts, let alone build the authority and legitimacy necessary to make policy through judicial decision-making. Furthermore, instead of handcuffing the political branches, the Singaporean judiciary gives its coordinate branches more discretion. In its early decisions, including *Chng Suan Tze*, the court averred that executive discretion to detain is subject to an “objective test” of judicial review.²²⁶ In other words, the president’s subjective judgment does not control; rather, “the court can objectively review the President’s exercise of discretion in the context of preventive detention on national security grounds.”²²⁷ Unfortunately, the change from the subjective test to the objective test was immediately negated when legislative revision reinstated the subjective test.²²⁸ The government emphasized the judiciary’s lack of expertise in national security and the importance of Singapore’s unique historical and cultural background, demonstrating its resistance to the global trend of constitutional engagement.²²⁹ “Since then, there seems to be a distinct shift away from the pro-individual approach in construing [fundamental liberties] advocated in *Ong Ah Chuan v. PP* and *Haw Tua Tau v. PP*.”²³⁰

Apart from overruling *Chng Suan Tze*, the Singaporean government also decided to cut its connection with the Privy Council in 1994 on the

223. TAN, *supra* note 187, at 207-09.

224. See Silverstein, *supra* note 221, at 437-38.

225. See MAUZY AND MILNE, *supra* note 179, at 40-44.

226. See Thio, *supra* note 207, at 160-67; Po Jen Yap, *The “Dead” Constitution: Crime and Punishment in Singapore*, 40 H.K. L. J. 577, 589 (2010).

227. Thio, *supra* note 87, at 453.

228. See Hor, *supra* note 204, at 277.

229. See VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 35 (2010).

230. Thio, *supra* note 207, at 160.

ground of national sovereignty.²³¹ During the founding stage, the government chose to keep the Privy Council as the last resort with an eye to assuring foreign investors that their property and investment would be duly protected.²³² By the end of the twentieth century, however, when Singapore's status as a global financial center and the judiciary's reputation for efficiency and neutrality had been firmly entrenched, this incentive dissipated. The severance with the Privy Council had several symbolic overtones. First, it indicated that foreign case law should not dictate domestic rulings in Singapore. This does not necessarily mean that courts cannot cite foreign decisions.²³³ Instead, the exclusion is lopsided: judicial importation is allowed, so long as the foreign case law is cited in support of domestically determined rulings.²³⁴ Consequently, the Singaporean judiciary cites foreign cases frequently, but only to buttress pre-determined conclusions, fortify domestic legitimacy, or demonstrate the lack of international consensus.²³⁵ This judicial parochialism, which fails to keep the constitutional development in Singapore in line with international standards, renders the judiciary more conservative and deferential to the political branches.

Last but not least, judicial independence in sensitive cases is not strong. In Singapore, all judges are appointed by the president.²³⁶ The judiciary is highly praised for its capability and probity in general.²³⁷ Though these are important hallmarks of judicial independence, the best litmus test for judicial independence is judicial willingness to intervene in cases with high political stakes, rather than exercise restraint and make decisions consistent with establishment interests. Many dissenters and foreign news media have claimed that the judiciary is biased in cases of political salience, and the tendency is particularly evident in libel cases.²³⁸ Contrary to the public figure doctrine in U.S. constitutional jurisprudence, criticism of politicians will receive less, rather than more, protection in Singapore, and the punishment will be more severe.²³⁹ In several libel cases involving Lee

231. Thio, *supra* note 177, at 67.

232. TAN, *supra* note 187, at 33-34.

233. *See generally* Thio, *supra* note 87.

234. *See* Thio, *supra* note 227, at 461-97.

235. *See id.*

236. CONST. OF THE REPUBLIC OF SINGAPORE July 1, 1999, art. 95.

237. *See* GAROUPA & GINSBURG, *supra* note 3, at 169.

238. *See* FRANCIS T. SEOW, BEYOND SUSPICION? THE SINGAPORE JUDICIARY 335-55 (2006).

239. *See* Worthington, *supra* note 186, at 508-09.

Kuan Yew and other public figures, critics even went bankrupt.²⁴⁰ Moreover, although judges in Singapore are well paid, life tenure is granted only to supreme-court judges.²⁴¹ This damages judicial independence, as self-censorship may be necessary for reappointment. Indeed, the necessity of seeking reappointment to lower courts has “subjugate[d] these courts directly to executive power; they are not part of an independent judiciary but an arm of executive government.”²⁴² What is worse, the number of lower-court judges has increased in recent years, a strategy that “transfer[s] the judicial role in suppressing political opposition from the supreme court to the district courts.”²⁴³

C. *A Lukewarm Civil Society*

Although the judicialization of politics generally has developed through interactions between political and judicial elites, it can sometimes be activated from below. The more frequently people use the courtroom as another political forum, the more likely the judiciary will expand its power at the expense of its coordinate branches, since the policymaking power is essentially put in the hands of judges by the public in this circumstance. Nevertheless, public interest litigation requires a huge amount of time, money, and talent. Without enough support, public interest litigation can be a flypaper that drains social groups of their limited resources.²⁴⁴ This explains in part why the bottom-up judicialization of politics is more prevalent in economically advanced jurisdictions, such as Hong Kong, South Korea, and Taiwan.

However, bottom-up judicialization has not materialized in Singapore, one of the most affluent countries in the world. In Singapore, more than 5,000 non-governmental organizations (NGOs) have registered, but the number of NGOs has not translated into a vibrant and active civil society in Singapore.²⁴⁵ The Singaporean government not only has failed to provide a robust support structure,²⁴⁶ but also has

240. *Id.* at 492.

241. Kevin Y.L. Tan, *As Efficient as the Best Businesses: Singapore's Judicial System*, in *ASIAN COURTS IN CONTEXT*, *supra* note 57, at 226, 234-35.

242. Worthington, *supra* note 186, at 496-97.

243. *Id.* at 501.

244. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 420-27 (2d ed. 2008).

245. See Eugene Kheng-Boon Tan, *Law and Values in Governance: The Singapore Way*, 30 *H.K. L.J.* 91, 108 (2000) (examining the role of law and the legal system in catalyzing Singapore's economic success).

246. See EPP, *supra* note 30, at 3.

obstructed cause lawyering and legal mobilization so that public interest litigation does not exist in Singapore at all.²⁴⁷

One such obstruction is the restriction of freedom of association. NGOs in Singapore are overseen by a variety of government councils, which use both carrots and sticks to contain social groups.²⁴⁸ On the one hand, these councils provide funding; on the other, to be legally registered, a civic group must not infringe “public peace . . . or good order.”²⁴⁹ Both public peace and good order are vague terms that can be manipulated at the government’s discretion. Any violation, however defined, will face penalties ranging from minor fines to yearlong imprisonment.²⁵⁰ In addition, civic groups that are not registered as political parties cannot run for elections.²⁵¹ This carrot-and-stick strategy successfully tames NGOs over time in the sense that they must cooperate in order to survive.²⁵²

Strict standing rules also negatively affect the judicialization of politics from below. In some countries such as Canada and India, the judiciary has loosened standing requirements to allow more public interest cases.²⁵³ This is not the case in Singapore, however. In contrast with the procedural liberation in other commonwealth countries, Singaporean courts have interpreted standing rules strictly, with an eye to limiting the scope of public interest litigation so that “[m]ost public interest cases were primarily dismissed by the courts in accordance with their strict rules on *locus standi*.”²⁵⁴ Although the Court of Appeal sporadically takes a liberal stance in cases concerning constitutional rights, this attitude does not hold across the board. Generally, petitioners are denied standing either because their constitutional rights are not directly violated or because their cases do not “fall within the categories recognized by the judiciary [that] can be subject to challenge by a public interest litigant.”²⁵⁵

247. See Roger Tan Kor Mee, *The Role of Public-interest Litigation in Promoting Good Governance in Malaysia and Singapore* 126-30 (2003), <http://scholarbank.nus.edu.sg/bitstream/10635/13461/1/RogerTanKorMee-G0202642-Thesis-LLM.pdf>.

248. See Jolene Lin, *The Judicialization of Governance: The Case of Singapore*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES, *supra* note 19, at 287, 303.

249. Tan, *supra* note 247, at 108.

250. *See id.*

251. *See id.*

252. *See* Lin, *supra* note 248, at 303.

253. *See* EPP, *supra* note 30, at 86, 168.

254. Tsun Hang Tey, *Limitations on Public-interest Litigation in Singapore*, in PUBLIC-INTEREST LITIGATION IN ASIA, *supra* note 138, at 99, 102.

255. *Id.* at 103-04.

In addition to these structural and institutional hurdles, the lack of legal talent is another obstacle to bottom-up judicialization that has been hard to overcome in Singapore. Consistent involvement of public interest lawyers is another pillar that undergirds judicialization of politics from below. As a corollary, Singapore's government also has deterred legal mobilization by depriving plaintiffs of their legal aid. In Singapore, the government wields many weapons to harass, silence, and constrain lawyers by trying to bankrupt them, damage their professional reputations, detain them without trial, and so on.²⁵⁶ These means have successfully discouraged attorneys from providing legal aid to social activists and prevent the judicialization of politics from below. Unlike Hong Kong, where the bar association has functioned independently and actively in supporting legal mobilization,²⁵⁷ the bar association in Singapore does not function effectively in promoting public interest litigation.²⁵⁸ Given the government's use of intimidation tactics, it should not be surprising that the Singaporean government does not provide any legal financial aid.

Finally, the chances of winning public interest litigation are bleak even if social groups overcome all these hurdles to get a case heard before a court. Most of the cases that challenge the government have failed because courts in Singapore regard rights claims as disruptive to social and religious harmony and stability.²⁵⁹ The low odds of success discourage future filings, and the judiciary consequently loses relevancy in the political arena. Unsurprisingly, neither politicians, nor lay people, see judicial review as an effective mechanism to bring about social change—and so a low volume of politically controversial cases follows.²⁶⁰

D. *Explaining the Failed Judicialization of Politics in Singapore*

The foregoing discussion makes it clear that judicialization of politics is not faring well in Singapore. Many institutional and political reasons may account for the extreme judicial self-restraint. To begin with, like Hong Kong, Singapore has not established a specific constitutional

256. See JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE, AND LEGITIMACY IN SINGAPORE* 161-218, 287-88 (2012); Worthington, *supra* note 186, at 508-09.

257. See Jones, *supra* note 106, at 110-11; TAM, *supra* note 52, at 47-48.

258. See Tey, *supra* note 254, at 103-04.

259. See Li-ann Thio, *Taking Rights Seriously? Human Rights Law in Singapore*, in *HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA* 158, 159-60 (Randall Peerenboom et al. eds., 2006).

260. See GINSBURG, *supra* note 15, at 73.

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court to tackle constitutional issues. Theoretically, a constitutional court with specific constitutional jurisdiction is beneficial to the judicialization of politics because the court will be able to focus its efforts in affecting high-level political reform without distraction from non-constitutional cases. This explains partly why most new democracies after the third wave of democratization establish constitutional courts separate from their original supreme courts. Admittedly, Singapore does formally have a constitutional tribunal, but it functions only as the president's constitutional adviser, and its services have been rarely invoked since the court's inception. In other words, it is not an independent constitutional court in practice.

Another institutional factor is Singapore's overall governmental structure. Compared with Singapore's parliamentary system, countries that adopt a presidential system are more likely to witness more intense judicialization of politics because different political parties may control the executive and the legislature.²⁶¹ In such circumstances, both the supply of and the demand for judicial intervention will increase. On the demand side, the fragmentation of political powers inevitably will lead to more controversies with respect to the separation of powers; on the supply side, the judiciary will be more willing to step into the political thicket, as the tolerance interval is larger when the political environment is unstable because no single political party monopolizes all political powers such that it can punish the judiciary unilaterally.²⁶² In contrast, Singapore is a parliamentary state in which the president exercises mostly ceremonial powers and the political power is monopolized by the congressional majority—the PAP.

Singapore's regime type is another institutional factor that discourages the judicialization of politics. Although general elections are held regularly and publicly, and the right to vote is essentially guaranteed, the playing field has been skewed heavily in favor of the ruling PAP such that Singapore is at best a competitive authoritarian regime, if not a hegemonic one.²⁶³ In fact, the PAP does not even try to disguise itself

261. See STONE SWEET, *supra* note 4, at 12-20.

262. See, e.g., Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, in CONTEMPLATING COURTS 315, 320-24 (Lee Epstein ed., 1995); Jack Knight & Lee Epstein, *Institutionalizing Constitutional Democracy*, in POLITICS FROM ANARCHY TO DEMOCRACY: RATIONAL CHOICE IN POLITICAL SCIENCE 196, 200-06 (Irwin L. Morris et al. eds., 2004); Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 127-31 (2001).

263. See STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 34, 343 (2010).

as a democratic government through open elections. Lee Kuan Yew, the founding father of Singapore, did not hesitate to express his distrust of Western liberal constitutionalism. To Lee, the most important function of elections is to make sure the “right person” gets elected, rather than to faithfully reflect popular will.²⁶⁴ In other words, meritocracy outweighs democracy. Therefore, although the Singapore government does not prohibit the formation of opposition parties, electoral institutions have been repeatedly revised with an eye to maintaining societal harmony and the dominance of the PAP. For example, Article 39A of the Constitution established the Group Representation Constituency (GRC), which was designed to ensure the representation of ethnic minorities.²⁶⁵ Despite its benign intent, the scheme has been criticized as a means to favor the PAP disproportionately as a result of the “coattail effect.”²⁶⁶ Moreover, opposition candidates usually face harassment from civil suits or police investigation and cannot focus on their campaigns.²⁶⁷ Access to media is strictly limited, and news coverage, if any, is hostile more often than not to the opposition because many mainstream newspapers are closely connected with the ruling party.²⁶⁸ Given the dominance of the PAP in every domain, there is little room for the judiciary to maneuver, let alone judicialize politics.

In addition to these political and institutional obstacles, the judiciary itself is lukewarm towards judicial policymaking. This reluctance is rooted in judges’ understanding of the judiciary’s role in government. Instead of seeing themselves as the sentinel of fundamental rights, Singaporean judges regard themselves as a part of the governmental apparatus, making sure that every state action is based on previously enacted laws, and nothing more.²⁶⁹ In other words, Singaporean judges emphasize the “thin version” of rule of law in the sense that procedural perfection, rather than substantive justice, is the core of a law’s constitutionality and the guide of state actions.²⁷⁰ This judicial philosophy mirrors Singapore’s legal culture, which is both bureau-

264. MAUZY & MILNE, *supra* note 179, at 143.

265. CONST. OF THE REPUBLIC OF SINGAPORE July 1, 1999, art. 39A (Sing.).

266. TAN, *supra* note 187, at 71.

267. MAUZY & MILNE, *supra* note 179, at 134-138.

268. *Id.* at 137-38.

269. Chua & Haynie, *supra* note 196, at 45.

270. ASIA WATCH COMMITTEE, SILENCING ALL CRITICS: HUMAN RIGHTS VIOLATIONS IN SINGAPORE 2 (1989).

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cratic and technocratic.²⁷¹ To be sure, the Singaporean judiciary is lauded for its independence and efficiency in certain economic spheres.²⁷² Nonetheless, the judiciary's independence does not extend to other politically sensitive domains; instead, and somewhat ironically, "[t]he stress on efficiency reveals a bureaucratic slant in the judicial mind-set which gives only perfunctory consideration to constitutional values."²⁷³ After all, it is relatively easy and safe to decide whether the government follows procedural requirements and avoid being embroiled in the controversies of substantive due process of law.

This apoliticism is not uncommon in judiciaries of other authoritarian regimes,²⁷⁴ but it is more evident in Singapore as a result of a political culture that emphasizes Confucianism and communitarian values.²⁷⁵ One of the most influential traditional ideologies in Asia, Confucianism promotes a hierarchical social structure in order to maintain an ordered and harmonious society.²⁷⁶ Borrowing from Confucian thinking, Lee Kuan Yew advocated the so-called "Asian values,"²⁷⁷ which prioritize obligations over rights, stability over liberty, and the collective over the individual. It follows that litigation based on rights claims is not welcomed.²⁷⁸ Furthermore, in Lee's interpretation, Confucianism justifies the monopoly of the PAP administration because power should be trusted to the most capable and righteous men.²⁷⁹ Popular vote is not necessarily reliable because people may be too shortsighted or passionate to make correct decisions. Both elements—that is, hostility towards litigation and political paternalism—lead to the conclusion that challenging political leaders through litigation is strongly discouraged. Therefore, the judiciary is reluctant to venture beyond its traditional role, and the judicialization of politics is less likely to take place.

271. *Id.*; see also RAJAH, *supra* note 256, at 37-42.

272. Chua & Haynie, *supra* note 196, at 44-45.

273. Thio, *supra* note 207, at 185.

274. See generally LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007).

275. See Tan, *supra* note 245, at 97.

276. DOH CHULL SHIN, *CONFUCIANISM AND DEMOCRATIZATION IN EAST ASIA* 74 (2012).

277. See STEPHEN MCCARTHY, *THE POLITICAL THEORY OF TYRANNY IN SINGAPORE AND BURMA: ARISTOTLE AND THE RHETORIC OF BENEVOLENT DESPOTISM* 78-85 (2006).

278. See PHILIP N. PILLAI, *STATE ENTERPRISE IN SINGAPORE: LEGAL IMPORTATION AND DEVELOPMENT* 9-10 (1983).

279. Orville Schell, *Lee Kuan Yew, the Man Who Remade Asia*, WALL STREET J. (Mar. 27, 2015), <https://www.wsj.com/articles/lee-kuan-yew-the-man-who-remade-asia-1427475547>.

Last but not least, the de-judicialization of politics may be more fathomable from the perspective of political calculation. Conventional wisdom has long held that courts shoulder several primary functions in authoritarian regimes.²⁸⁰ Among these functions, reducing agency cost and solving coordination problems become increasingly crucial as political power becomes more concentrated and the complexity of regulatory regimes increases.²⁸¹ The agency cost is particularly urgent in geographically large countries, such as China, where the principal-agent problem has resulted in parochialism that has plagued economic development in recent years.²⁸² Nonetheless, this is not the case in Singapore, a small city-state. Given Singapore's small geographical size, neither the need to coordinate nor the agency cost is pressing. That is, the Singapore government does not rely on the judiciary for good governance as much as countries where agency cost is high.

On the other hand, the judiciary has become less assertive as the policymaking process has grown more complex because judges lack expertise in the economic domain relative to their political counterparts. Even in the domain of racial politics and citizenship that are usually the targets of judicialization of politics in other countries, Singapore's constitution and government avoid using the language of rights in order to prevent judicial intervention.²⁸³ In other words, there is no cost-effective reason for Singaporean politicians to empower the courts, even though they fully control judicial personnel. In addition, the PAP government relies on Singapore's economic success as one of the wealthiest countries in the world, rather than judicial endorsement, to undergird its legitimacy.²⁸⁴

Like the other three Asian Tigers, where the legal systems are mainly instruments to accomplish state goals, Singapore's courts stress the procedural dimension of rule of law, such as predictability, clarity,

280. See Moustafa & Ginsburg, *supra* note 12, at 4-11.

281. See Ginsburg, *supra* note 19, at 7-9.

282. See Xin He, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in BUILDING CONSTITUTIONALISM IN CHINA 143, 146-156 (Stéphanie Balme & Michael W. Dowdle eds., 2009); Michael Palmer, *Compromising Courts and Harmonizing Ideologies*, in NEW COURTS IN ASIA 251, 262-263 (Andrew Harding & Penelope (Pip) Nicholson eds., 2010); Eric C. Ip, *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 COLUM. J. ASIAN L. 367, 414-415 (2011); Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 280-286 (2003).

283. See Eugene K.B. Tan, *Racial Politics and Imperatives and the Constitutional Special Position of the Indigenous Malays in a New Society*, in POLITICS AND CONSTITUTIONS IN SOUTHEAST ASIA, *supra* note 218, at 226, 227-33.

284. See Thio, *supra* note 259.

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stability, and generality. In so much as this procedural justice is concerned, judicial independence is respected. Beyond the economic sphere, however, the judiciary in Singapore is notoriously deferential to the executive, at least in the past three decades. It did sometimes rule against the political branches, but merely on procedural grounds; rarely, if ever, did the judiciary challenge the substantive policy choices of the ruling party. In addition to institutional and cultural factors, conventional wisdom is persuasive here: overshadowed by a hegemonic political party that has continuously ruled Singapore for five decades, it is hard to blame the judges for their cautiousness.

IV. JURISTOCRACY IN EAST ASIA: THE CASE OF SOUTH KOREA

In the Four Asian Tigers, South Korea may be the jurisdiction that is closest to so-called juristocracy. The Constitutional Court of Korea was established after democratization as a symbol to break with the past, and not only declares impugned laws unconstitutional regularly, but also wields many powers of political salience. To name a few, it had dissolved a political party with a few seats in congress and impeached a sitting president in the past five years.²⁸⁵ It has also halted several major national policies, including the relocation of the capital.²⁸⁶ Given the political competition and judicial activism, few courts parallel the Korean Constitutional Court in terms of the depth and width of judicialization of politics. This Section details the development of judicialization of politics in Korea and explains the factors that elicit such judicial expansion.

A. *Political Background*

At the end of World War II, the Republic of Korea (now known as South Korea) announced its independence from Japan. Thereafter, it was a military regime for four decades, despite the short-lived Second

285. See Choe Sang-Hun, *South Korea Removes President Park Geun-hye*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/world/asia/park-geun-hye-impeached-south-korea.html> (reporting on the impeachment of president); Choe Sang-Hun, *South Korea Disbands Party Sympathetic to North*, N.Y. TIMES (Dec. 19, 2014), <https://www.nytimes.com/2014/12/20/world/asia/south-korea-disbands-untied-progressive-party-sympathetic-to-north-korea.html> (reporting on the party dissolution case).

286. *South Korea opens 'mini capital' in Sejong City*, BBC NEWS (July 2, 2012), <http://www.bbc.com/news/world-asia-18670195>.

Republic.²⁸⁷ Military rulers monopolized all political powers, and the judiciary was mostly silent.²⁸⁸ Starting in the late 1960s, South Korea enjoyed remarkable economic growth under the Park Chung-Hee administration.²⁸⁹ But Park was assassinated in 1979, and his confidant Chun Doo-Hwan was elected as president of the Fifth Republic by a “rubber-stamp electoral college”²⁹⁰ after a “coup-like incident” in 1980.²⁹¹

In 1988, President Roh Tae-woo promulgated the Constitution after negotiating with two main opposition leaders, Kim Young-sam and Kim Dae-jung. This historic negotiation epitomized the process of democratic transition, which was a compromise between the military government and opposition forces. Neither side could suppress the protests or overthrow the *ancien régime* unilaterally. Partly because of this, Roh won the first presidential election with 36.7% of votes, despite his close ties with the former military regime, thanks to Kim Young-sam and Kim Dae-jung splitting votes,²⁹² who were elected as President respectively in 1993 and 1998.

In addition to mandating direct presidential election, the Constitution of 1987 established the Korean Constitutional Court and vested it with the power of judicial review,²⁹³ a design that paved the road to the judicialization of politics in Korea.²⁹⁴ The Korean Constitutional Court initially was not expected to play a significant role in Korea’s politics²⁹⁵ because few Koreans had heard about constitutional litigation at that time.²⁹⁶ This is because both the Korean Supreme Court and the Constitutional Committee, the two institutions responsible for constitu-

287. See BYONG-MAN AHN, *ELITES AND POLITICAL POWER IN SOUTH KOREA* 73-103 (2003); DAE-KYU YOON, *LAW AND DEMOCRACY IN SOUTH KOREA: DEMOCRATIC DEVELOPMENT SINCE 1987*, at 13-19 (2010).

288. See GINSBURG, *supra* note 15, at 208-13.

289. See CHOONG NAM KIM, *THE KOREAN PRESIDENTS: LEADERSHIP FOR NATION BUILDING* 151-54 (2007).

290. C.I. Eugene Kim, *The South Korean Military and Its Political Role*, in *POLITICAL CHANGE IN SOUTH KOREA* 91, 101 (Ilpyong J. Kim & Young Whan Kihl eds., 1988).

291. Kim, *supra* note 289, at 169.

292. See HEE-MIN KIM, *KOREAN DEMOCRACY IN TRANSITION: A RATIONAL BLUEPRINT FOR DEVELOPING SOCIETIES* 8-24 (2011) (explaining the split from a rational choice model).

293. Note that judicial review has been prescribed in the first Korean Constitution in 1948.

294. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 111 (S. Kor.).

295. Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 75 (1997-1998).

296. Hahm Chaihark, *Rule of Law in South Korea*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.* 385, 395 (Randall Peerenboom ed., 2004).

tional review during the authoritarian periods,²⁹⁷ were notoriously inefficient and subservient to the strongman government.²⁹⁸ Unlike its predecessors, however, the Constitutional Court has become a crucial actor in Korean politics by exercising the power of judicial review progressively. Moreover, the development of judicialization of politics in Korea has gone far beyond the practice of judicial review in recent years, as the judiciary has engaged in other acts of judicial activism. Nowadays the Korean Constitutional Court is not only a guardian of fundamental rights, but also a policy-maker that has intervened in both ordinary politics and mega-politics.

B. *Judicial Expansion in South Korea*

Unlike Hong Kong and Singapore, South Korea inherited the civil-law system from Japan.²⁹⁹ Due to distrust of the ordinary courts and career judges that were seen as a colonial legacy,³⁰⁰ South Korea founded a new Constitutional Court, modeled on the German Federal Constitutional Court (*Bundesverfassungsgericht*).³⁰¹ In addition to the power of judicial review, the Constitutional Court also possesses many ancillary powers, such as the power to dissolve political parties and the power to adjudicate impeachment cases.³⁰² Furthermore, it has strategically expanded its political clout by relaxing the standing rules and expanding its jurisdiction.³⁰³ These changes are politically important because the standing rules are “designed to limit the occasions for

297. Jongcheol Kim & Jonghyun Park, *Causes and Conditions for Sustainable Judicialization of Politics in Korea*, in *THE JUDICIALIZATION OF POLITICS IN ASIA* 37, 38 (Björn Dressel ed., 2012).

298. See Jibong Lim, *Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions*, 24 *LOY. L.A. INT'L & COMP. L. REV.* 327, 327-28 (2002); GINSBURG, *supra* note 15, at 208-13; Kim & Park, *supra* note 297, at 38.

299. Jongcheol Kim, *Courts in the Republic of Korea: Featuring a Built-in Authoritarian Legacy of Centralization and Bureaucratization*, in *ASIAN COURTS IN CONTEXT*, *supra* note 57, at 112, 122-23.

300. See CHAIHARK HAHM & SUNG HO KIM, *MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA* 177-80 (2015).

301. For a brief introduction to the Korean Constitutional Court, see Youngjoon Kwon, *Korea: Bridging the Gap Between Korean Substance and Western Form*, in *LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS* 151, 166-67 (E. Ann Black & Gary F. Bell eds., 2011); Dai-Kwon Choi, *Legal System: Korea*, in *JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD* 3, 12-18 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

302. GINSBURG, *supra* note 15, at 218.

303. Gavin Healy, *Judicial Activism in the New Constitutional Court of Korea*, 14 *COLUM. J. ASIAN L.* 213, 223-24 (2000-2001).

judicial interference with political process.”³⁰⁴

With these increased powers, the Constitutional Court in South Korea is the most active constitutional tribunal in East Asia, intervening in both ordinary policymaking and mega-politics, such as issues concerning transitional justice and national identity. It has also exercised its power to adjudicate impeachment cases against sitting presidents twice and dissolved a pro-North Korea political party, simultaneously disqualifying five incumbent members of parliament affiliated with that party.³⁰⁵ It even created “customary constitutional law” to strike down a national project that aimed to relocate the Korean capital.³⁰⁶

To illustrate further, the Constitutional Court took an activist role in the case concerning transitional justice and the Kwangju Incident,³⁰⁷ which has been one of the most controversial issues in South Korea after democratization.³⁰⁸ Briefly speaking, the incident was a massacre in which the government suppressed and slaughtered thousands of peaceful protestors, many of whom were college students.³⁰⁹ During the process of investigation, the defendants—Chun Doo-Hwan and Roh Tae-Woo, two former Korean presidents—argued that the statute of limitations had immunized them from further prosecution, which was true.³¹⁰ Given the identities of the defendants and the death toll in the incident, it was an extremely sensitive, if not the most sensitive case, in the history of Korean jurisprudence. The Constitutional Court ruled that the statute of limitations protected the two former presidents from

304. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 39 (1999).

305. Choe Sang-Hun, *South Korea Disbands Party Sympathetic to North*, N.Y. TIMES (Dec. 19, 2014), <https://www.nytimes.com/2014/12/20/world/asia/south-korea-disbands-united-progressive-party-sympathetic-to-north-korea.html>.

306. Andrew Salmon, *Korea Court Rejects Plan for Capital Relocation*, N.Y. TIMES (Oct. 22, 2004), <http://www.nytimes.com/2004/10/22/world/asia/korea-court-rejects-plan-for-capital-relocation.html>.

307. For more details about this issue, see, for example, In-sup Han, *Kwangju and Beyond: Coping with Past State Atrocities in South Korea*, 27 HUMAN RIGHTS Q. 998 (2005); HUMAN RIGHTS IN KOREA: ACTIVITIES AND RESULTS OF THE PRESIDENTIAL TRUTH COMMISSION ON SUSPICIOUS DEATHS 126-29 (Kwang-Jun Tsche ed., 2005); Wonmo Dong, *Student Activism and the Presidential Politics of 1987 in South Korea*, in POLITICAL CHANGE IN SOUTH KOREA, *supra* note 290, at 169, 169-71; Tom Ginsburg, *The Constitutional Court and Judicialization of Korean Politics*, in NEW COURTS IN ASIA, *supra* note 282, at 145, 149-50.

308. See Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs after Democratization*, in LAW AND SOCIETY IN KOREA 189, 190-93 (Hyunah Yang ed., 2013) (reviewing the judicial decisions regarding Korea’s dark past, and providing a Korean method to deal with past wrongs).

309. Han, *supra* note 307, at 1001.

310. *Id.* at 1008-09.

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being charged in relation to the 1979 coup d'état, but that other crimes, including participation in the Kwangju Incident, were still prosecutable.³¹¹ Pressured by public opinion that was dissatisfied with the ruling, the Kim administration passed the Special Act to extend the prosecution period in December 1995.³¹² The accused challenged the constitutionality of the Act by arguing that it was *ex post facto* law.³¹³ Facing this thorny predicament between substantive justice and procedural rule of law, the Constitutional Court delivered an opinion that technically upheld the constitutionality of the Act so that it did not frustrate the government directly.³¹⁴ The Act was upheld not because it was just, but because in South Korea, it requires six votes out of nine to declare a statute unconstitutional and void.³¹⁵ In this case, a majority (five justices) disagreed with the executive and voted in favor of the defendants, but the number was not enough to nullify the statute.³¹⁶

The judicialization of politics continued to develop in the twenty-first century such that some scholars call the Roh Moo-hyun administration “the period of judicialization.”³¹⁷ In 2003, Roh violated electoral law during an election and was impeached by the opposition party in Congress.³¹⁸ Before the Constitutional Court delivered its opinion, his party won a landslide election victory, which confirmed his popularity among the public.³¹⁹ Furthermore, most lawyers, law professors, and students opposed the impeachment motion at that time.³²⁰ Given the clear political climate, the Constitutional Court ruled that Roh’s breach of election law did not constitute a “grave violation” as required for successful impeachment.³²¹ Another example is the relocation-of-the-capital case.³²² In 2003, Roh tried to move the capital from Seoul to

311. Tom Ginsburg, *Introduction*, in LEGAL REFORM IN KOREA 1, 5 (Tom Ginsburg ed., 2004).

312. See Jeong-Ho Roh, *Crafting Constitutional Democracy in Korea*, in KOREA’S DEMOCRATIZATION 181, 187-88 (Samuel S. Kim ed., 2003).

313. Kim & Park, *supra* note 297, at 43.

314. Constitutional Court [Const. Ct.], 1996Hun-ka2, Feb. 16, 1996, (S. Kor.).

315. Han, *supra* note 307, at 1014.

316. *Id.*

317. Jongcheol Kim, *Government Reform, Judicialization, and the Development of Public Law in the Republic of Korea*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES, *supra* note 19, at 100, 102-03.

318. KIM, *supra* note 292, at 87.

319. *Id.* at 97.

320. See Jonghyun Park, *The Judicialization of Politics in Korea*, 10 ASIAN-PAC. L. & POL’Y J. 62, 72-74 (2008-2009).

321. Kim & Park, *supra* note 297, at 42.

322. Constitutional Court [Const. Ct.], 2004Hun-Ma554, Oct. 21, 2004, (S. Kor.).

another location to encourage development in less developed regions, as he had promised during his 2002 presidential campaign.³²³ Although the Constitution of South Korea does not expressly designate the location of capital, opposing politicians challenged the constitutionality of the project and related statutes. The Constitutional Court ruled against the government, contending that “customary constitutional law” required Seoul to be the capital of South Korea.³²⁴ Reluctantly succumbing to the decision, the Roh administration enacted a new statute that downsized the scale of relocation, and the Constitutional Court upheld it.³²⁵

Other cases in which the judiciary intervened in mega-politics include the national-identity case³²⁶ and the dissolution of a political party.³²⁷ Before 2001, the Overseas Koreans Act required that expatriate Koreans must demonstrate certain documents to prove their identity.³²⁸ This could be difficult for expatriates because South Korea did not have diplomatic relations with some of the countries in which Koreans resided immediately after World War II.³²⁹ In 2001, the Constitutional Court struck the Act down, maintaining that overseas Koreans and their descendants should not be blamed for being unable to present documents that might not even exist.³³⁰ In 2014, the Court disbanded the Unified Progressive Party, a left-wing political entity that allegedly supported North Korea, on the ground of the “basic democratic order.”³³¹ This was the first time the Constitutional Court invoked the power to dissolve a political party, which still had five seats in congress at the time of dissolution.³³² Although no law prescribed whether a lawmaker should lose her seat in this unprecedented circumstance, the Constitutional Court nevertheless decided to remove these congressional members affiliated with the dissolved party.³³³ These

323. See Salmon, *supra* note 306.

324. See Kim & Park, *supra* note 297, at 40-42.

325. *Id.*

326. See Chaihark Hahm, *Beyond “Law vs. Politics” in Constitutional Adjudication: Lessons from South Korea*, 10 INT’L J. CONST. L. 6, 20-22 (2012) (seeking to situate the development of constitutional adjudication in Korea within a global context). For a more comprehensive introduction, see HAHM & KIM, *supra* note 300.

327. Sang-Hun, *supra* note 305.

328. See Hahm, *supra* note 326, at 20-22.

329. *Id.*

330. *Id.*

331. Constitutional Court [Const. Ct.], 2013Hun-Da1, Dec. 19, 2014, (S. Kor.).

332. See *id.*; see also Sang-Hun, *South Korea Disbands Party Sympathetic to North*, *supra* note 285.

333. See Constitutional Court [Const. Ct.], 2013Hun-Da1, Dec. 19, 2014, (S. Kor.).

decisions are of political salience because they tackled the core issue of every constitutional democracy—the identity of “We the People.” The Constitutional Court exercised not only the power to say what the law is, but also the power to shape the constitutional identity of a country.

Given its deep intervention in mega-politics, it should come as no surprise that the Constitutional Court has also been embroiled in normal politics, including, but not limited to, gerrymandering.³³⁴ Moreover, similar to the CFA in Hong Kong, the Constitutional Court in South Korea has also examined the procedural requirement of legislative process, an area within the self-governance domain of the legislature.³³⁵ In 1996, the ruling party of the National Assembly secretly convened at 6 a.m. and passed several labor laws. Although the Constitutional Court upheld the constitutionality of these laws owing to political considerations,³³⁶ it nevertheless declared that the secret convention violated opposition members’ right to deliberate and vote.³³⁷

Finally, ordinary courts also have participated in the process of policymaking. In 2003 and 2005, the Seoul Administrative Court twice suspended the Saemangeum Reclamation Project, a fifteen-year national project that cost billions of dollars.³³⁸ In 2010, the Supreme Court delivered a controversial decision in which it declared a presidential emergency decree unconstitutional.³³⁹ These decisions reflect the shrinking of executive discretion³⁴⁰ and the doctrine of political question in the context of criminal procedure and national security.³⁴¹

C. Legal Mobilization in South Korea

Unlike Hong Kong, where judicial intervention is launched exclusively from below, or Singapore, where there is little sign of judicial expansion, the case of South Korea illustrates the blossom of judicializa-

334. See GINSBURG, *supra* note 15, at 227-28; Jongcheol Kim, *Upgrading Constitutionalism: The Ups and Downs of Constitutional Developments in South Korea since 2000*, in CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY, *supra* note 60, at 76, 83-84.

335. John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 43 (2002).

336. GINSBURG, *supra* note 334, at 235.

337. *Id.*

338. Kim, *supra* note 317, at 117; Lee Jae-Hyup, *Negotiating Values and Law: Environmental Dispute Resolution in Korea*, in LEGAL REFORM IN KOREA, *supra* note 319, at 199, 205-08.

339. See Kim, *supra* note 334, at 81-82.

340. Ahn, *supra* note 295, at 107-09, 112-15.

341. Kim & Park, *supra* note 297, at 43-44 (examining the impact of cultural heritage on the development of constitutionalism in Korea and providing a historical overview of Korea’s postwar democratic development from a constitutional perspective).

tion of politics both from above and from below. From above, as aforementioned, politicians rush to courtrooms whenever there is a political controversy and kowtow to constitutional decisions with which they may not be completely satisfied. From below, public interest groups and cause lawyers have frequently brought their cases in front of judges. Compared with its coordinate branches, the Korean Constitutional Court is regarded as more trustworthy by the public because it is assertive in the domain of human rights.³⁴² This confidence in turn encourages legal mobilization, which has provided grassroots momentum for the judicialization of politics.³⁴³

One indicator of the success of legal mobilization in South Korea is the number of public interest groups, which has increased steadily over time since political liberation.³⁴⁴ These progressive social groups have taken advantage of judicial review to press for political and social change. This has been particularly true because “[n]ew procedural laws and institutional developments have facilitated litigation over issues concerning public interests.”³⁴⁵ The cases about the revision of the Civil Code to enhance gender equality provide the paradigm example. Immersed in the Confucian tradition, many provisions in the Korean Civil Code discriminated against women on the grounds of stereotypes or outdated traditions.³⁴⁶ To eradicate this pattern of discrimination, the Constitutional Court declared unconstitutional a civil code provision that prohibited a person from marrying another with the same surname in order to prevent incest.³⁴⁷ It also struck down the male-dominated household system, which essentially gave husbands the final say over domestic issues, stating that it was predicated on archaic stereotypes of women.³⁴⁸ In fulfillment of these mandates, the National

342. Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 PAC. RIM L. & POL'Y J. 395, 413 (1995).

343. Tae-Ung Baik, *Public-interest Litigation in South Korea*, in PUBLIC-INTEREST LITIGATION IN ASIA, *supra* note 138, at 115.

344. Kyoung-Ryung Seong, *Civil Society and Democratic Consolidation in South Korea: Great Achievements and Remaining Problems*, in CONSOLIDATING DEMOCRACY IN SOUTH KOREA 87, 90-92 (Larry Diamond & Byung-Kook Kim eds., 2000).

345. Baik, *supra* note 343, at 115.

346. See MARIE SEONG-HAK KIM, LAW AND CUSTOM IN KOREA: COMPARATIVE LEGAL HISTORY 286-92 (2012).

347. *Id.* at 289. For a detailed introduction to this decision, see Lim Jibong, *The Korean Constitutional Court, Judicial Activism, and Social Change*, in LEGAL REFORM IN KOREA, *supra* note 311, at 19, 20-33.

348. Kim & Park, *supra* note 297, at 40.

Assembly amended the Civil Code in 2005.³⁴⁹

D. *Explaining the Judicialization of Politics in South Korea*

The case of South Korea may be the clearest example in which judicial empowerment can be explained by politicians' desire to buy political insurance.³⁵⁰ During the democratization process, South Korea fell squarely in the "transplacements" model, in which opposition parties were not strong enough to reshape the political order unilaterally and had to collaborate with old ruling elites.³⁵¹ The current political environment in South Korea remains precarious after political liberation in the sense that no political party can stay in power for a very long time.³⁵² Unlike Taiwan, where the Nationalist Party continued to play a major political role before and after democratization, political power in South Korea is much more fragmented. This is evident from its first presidential election, in which all three candidates gained less than forty percent of the votes. In such circumstances, it is natural for politicians to strengthen an independent judiciary with an eye to constraining the electoral winner and preserving their own chances of returning to power.³⁵³

Indeed, self-interested motivation caused by political uncertainty was the major reason that resulted in the birth of the Korean Constitutional Court. As mentioned above, at the early stage of democratic transition, the military government and the opposition parties were roughly of the same power, and neither side could unilaterally orchestrate the path and process of democratization. In fact, President Roh Tae-woo won only marginally in the first presidential election.³⁵⁴ Given the political uncertainty, it is not surprising that the Constitutional Court was vested with expansive powers in the Constitution of 1987. Political uncertainty provides more room for judicial intervention for at least two further reasons. From the demand side, there will be more political disagreements, conflicts, and deadlocks that politicians rely on the judiciary to resolve. From the supply side, politicians who disagree with each other cannot check or curb judicial decisions effectively, even if they are

349. Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, *amended by* Act No. 8720, Dec. 21, 2007 (S. Kor.).

350. See GINSBURG, *supra* note 15, at 22-30.

351. HUNTINGTON, *supra* note 24, at 151-63.

352. See Sunhyuk Kim, *Civil Society in Democratizing Korea*, in KOREA'S DEMOCRATIZATION, *supra* note 312, at 81, 105-06.

353. See GINSBURG, *supra* note 15, at 22-30.

354. See KIM, *supra* note 292, at 5.

politically dissatisfying. Both these supply-and-demand factors make the judiciary more willing to step into the political arena.

Institutional design also helps account for the development of the judicialization of politics in South Korea. To begin with, the Constitution of 1987 expressly grants the power of judicial review to the Constitutional Court,³⁵⁵ a design that solves the counter-majoritarian difficulty to some extent. The transfer of judicial review from ordinary courts to a specific constitutional tribunal not only strengthens the people's confidence in the Constitutional Court, but also prevents justices of the Constitutional Court from being bombarded with trivial issues.

The appointment mechanism of the justices matters as well. Of the nine justices on the Constitutional Court, three are nominated by the president, another three by the national assembly, and the last three by the chief justice of the Supreme Court.³⁵⁶ Therefore, the composition of the Constitutional Court is likely to mirror political fragmentation. This appointment mechanism may be beneficial to the judicialization of politics for two reasons. On the one hand, both the ruling and opposition parties know that they have some allies on the bench, and therefore are more willing to judicialize political controversies. On the other hand, the decisions tend to be more moderate because the justices represent different political preferences and ideologies and must compromise with each other. Accordingly, the fact that there is no absolute winner or loser encourages potential litigants to go to court. Furthermore, the Constitutional Court possesses several ancillary powers, including the power to dissolve unconstitutional parties and adjudicate impeachment cases.³⁵⁷ As mentioned above, it has exercised these powers on multiple occasions. In 2016, the National Assembly impeached President Park Geun-hye, who was accused of corruption and other serious misbehaviors. This time, the Constitutional Court unanimously upheld the impeachment in March 2017, forcing Park out of the Blue House.³⁵⁸ Park became the first president to be impeached, and the authority of the Constitutional Court, as the final arbiter of political conflicts, was entrenched.

355. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 111 (S. Kor.); see GINSBURG, *supra* note 15, at 218.

356. See GINSBURG, *supra* note 15, at 220.

357. *Id.* at 218.

358. Sang-Hun, *South Korea Removes President Park Geun-hye*, *supra* note 285.

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Public support is critical to the judicialization of politics from below because it not only broadens the “tolerance zone” of the judiciary,³⁵⁹ but also reduces the risk of political backlash.³⁶⁰ In South Korea, the judiciary is the most popular branch among the three government branches.³⁶¹ Also, the rise of the Korean Bar Association and social groups, directly or indirectly, has contributed to the explosion of the judicial docket, creating more chances for judicial intervention in the political arena. Starting from the 1980s, the quota of lawyers has increased rapidly such that it is ten times larger than three decades ago.³⁶² With the steady increase in new lawyers each year, new categories of suits, such as environmental protection and state compensation, have emerged. These new issues expand the scope of judicial review and empower the judiciary accordingly. Last but not least, many prominent lawyers have become main actors in the political field. Former President Roh Moo-hyun himself was an activist lawyer who affiliated with the Lawyers for Democratic Society (Minbyun).³⁶³ After his election, he also appointed some Minbyun members to important governmental positions.³⁶⁴ This stimulated more judicialization of politics because these legally trained politicians had rich experience taking advantage of litigation to pursue their agendas when they were public interest lawyers.

This is not to say that every institution in Korea is favorable to the judicialization of politics. On the contrary, some institutional designs may limit, if not damage, the Constitutional Court’s clout in the political arena. To give an example, the Korean Constitutional Court does not have the power of abstract review.³⁶⁵ Theoretically, judicial decisions will be more influential if they are detached from concrete contexts because the reasoning may be applicable universally. In

359. See, e.g., Epstein & Walker, *supra* note 262, at 320-24; Knight & Epstein, *supra* note 262, at 200-06; Epstein et al., *supra* note 262, at 127-31.

360. See Epstein et al., *supra* note 262, at 155-56.

361. See Tom Ginsburg, *Constitutional Courts in East Asia*, in *COMPARATIVE CONSTITUTIONAL LAW IN EAST ASIA* 47, 56 (Rosalind Dixon & Tom Ginsburg eds., 2014) (analyzing several possible factors that might help explain the emergence of effective constitutional constraints in Thailand, South Korea, Mongolia and Taiwan).

362. Dae-Kyu Yoon, *The paralysis of legal education in Korea*, in *LEGAL REFORM IN KOREA*, *supra* note 311, at 36, 40-41.

363. See Joon Seok Hong, *From the Streets to the Courts: PSPD’s Legal Strategy and the Institutionalization of Social Movements*, in *SOUTH KOREAN SOCIAL MOVEMENTS: FROM DEMOCRACY TO CIVIL SOCIETY* 96, 109 (Gi-Wook Shin & Paul Y. Chang eds., 2011).

364. *Id.*

365. See GINSBURG, *supra* note 15, at 218.

common-law countries, such as the United States, the influence of judicial decisions relies upon the doctrine of *stare decisis*, which is also formally unavailable in South Korea. From this perspective, the impact of any single case, however politically crucial, may be limited in the future. Furthermore, justices in the Constitutional Court serve a renewable term of six years, and the pressures of seeking re-appointment may undermine judicial independence.³⁶⁶ Finally, congressional minorities are not entitled to challenge the constitutionality of any laws enacted by the majority in South Korea.³⁶⁷ This mechanism has proved crucial in judicializing political quarrels in other countries, such as Taiwan.

V. A PROACTIVE COURT HAUNTED BY THE PAST: THE CASE OF TAIWAN

The Constitutional Court of Taiwan, one of the oldest constitutional tribunals in Asia, was established in China in 1948. During the Chinese civil war, it moved to Taiwan and remained deferential to the political branches until the lifting of martial law in 1987. After political liberation, party turnover has provided rich soil for the judicialization of politics, and the authority and popularity of the Constitutional Court have escalated significantly. Nowadays, the Constitutional Court has intervened in almost every major controversy and become the most trustworthy branch among the three. Unlike its Korean counterpart, however, it is still conservative in the domain of restorative justice. This section will articulate different facets of judicialization of politics in Taiwan and explain the judiciary's activeness and cautiousness.

A. *Political Background*

Taiwan's Constitutional Court, also known as the Council of Grand Justices,³⁶⁸ was founded in mainland China and was responsible for interpreting the Constitution of the Republic of China.³⁶⁹ Although it was the first constitutional court established in Asia, its record in the judicialization of politics is mixed. Like many other high courts, it was born in one of the most tumultuous periods in Chinese history.³⁷⁰ Not long after the establishment of the Council of Grand Justices, the

366. *Id.* at 221.

367. *Id.* at 218-19.

368. For further introduction, see Chang-fa Lo, *Taiwan: External Influences Mixed with Traditional Elements to Form Its Unique Legal System*, in LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS 91, 103 (Ann Black & Gary F. Bell eds., 2011).

369. GINSBURG, *supra* note 15, at 120-21.

370. *Id.*

Nationalist Party (KMT), which ruled China at the time, lost the Chinese civil war and fled to Taiwan.³⁷¹ A few justices went to Taiwan along with the KMT troops, some remained in China, and others went to Hong Kong.³⁷² Because the Constitutional Court was unable to meet the quorum in Taiwan, it was paralyzed for a period of time.³⁷³

In addition to the quorum problem, then-President Chiang Kai-shek issued Temporary Provisions and instituted martial law, suspending many constitutional provisions.³⁷⁴ At that time, Taiwan was an authoritarian regime led by the KMT, in which Chiang monopolized all political powers.³⁷⁵ Although the Constitutional Court still could exercise the power of judicial review, it was passive and deferential to the executive. After the death of Chiang Kai-shek, his son, Chiang Ching-kuo, succeeded.³⁷⁶ Under his reign, the economy grew exponentially, the middle class emerged, and democratization thus began. Bans on newspapers and political parties were lifted, and the first opposition party, the Democratic Progressive Party (DPP), was established in 1986.³⁷⁷ Many local Taiwanese were promoted to higher positions, including vice president and justices of the Constitutional Court.³⁷⁸ The subservient Constitutional Court gradually became more assertive in some cases, but it remained cautious most of the time.

The court's subservient attitude did not change significantly until Lee Teng-hui succeeded as the president after Chiang Ching-kuo's death. Since then, there have been seven rounds of constitutional reforms, which have dramatically revised the Constitution and changed the political landscape in Taiwan since democratization. The old representative elected in mainland China before the civil war retired, and the opposition party garnered more and more seats in congressional and mayoral elections. The people now have the right to select their

371. *Id.* at 117.

372. GUO SHI GUAN, ZHONGHUAMINGUO SHI FALU ZHI (中華民國史法律志) 50 (1994).

373. *Id.*

374. Thomas Gold, *Retrosession and Authoritarian KMT Rule*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY TAIWAN 36, 41 (Gunter Schubert ed., 2016).

375. *Id.* at 43-44.

376. *Id.* at 44.

377. *Id.* at 48.

378. See J. Bruce Jacobs, "Taiwanization" in *Taiwan Politics*, in CULTURAL, ETHICAL AND POLITICAL NATIONALISM IN CONTEMPORARY TAIWAN 17, 33, 36-37 (John Makeham & A-chin Hsiao eds., 2005).

own legislators and president directly.³⁷⁹

In 2000, the first party turnover occurred when the DPP candidate Chen Shui-bian defeated the KMT and the People First Party.³⁸⁰ In 2008, the victory of the KMT candidate Ma Ying-jeou represented the second power alternation.³⁸¹ In 2016, Tsai Ing-wen took back the presidency for the DPP and became the first female president of Taiwan.³⁸² Clearly, Taiwan has successfully passed the two-turnover test³⁸³ and become a mature democracy in Asia. Meanwhile, the judicialization of politics has made great strides in almost every dimension. Judicial power has expanded quickly at the expense of the political branches. During the process of judicial expansion, judicial authority and popularity have increased considerably such that the Constitutional Court has stepped into some areas that were exclusively reserved for elected branches. The two major parties—the KMT and the DPP—face different predicaments and choose to judicialize politics for varying reasons.³⁸⁴

B. *Judicial Power and Judicial Expansion*

Taiwan has a mixed record of judicialization of politics. Compared with Hong Kong and Singapore, the judiciary in Taiwan is considerably more active in the political sphere; compared with South Korea, however, it is relatively conservative in certain domains. In Taiwan, the power of abstract judicial review has been granted to the Constitutional Court since the court's foundation.³⁸⁵

In addition to judicial review, constitutional amendments have granted the Constitutional Court the powers to adjudicate impeachment cases and to dissolve political parties,³⁸⁶ although it has never exercised such powers. Furthermore, although statutory revision is a less dramatic form of judicial expansion, it is equally influential on

379. See MELISSA BROWN, IS TAIWAN CHINESE?: THE IMPACT OF CULTURE, POWER, AND MIGRATION ON CHANGING IDENTITIES, 223, 246 (2004); JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS, 37-49 (2016).

380. J. Bruce Jacobs, *Taiwan During and After the Democratic Transition*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY TAIWAN, *supra* note 374, at 51, 59-60.

381. *Id.* at 63.

382. *Id.* at 66.

383. See HUNTINGTON, *supra* note 24, at 266.

384. See Jiunn-rong Yeh, *Democracy-driven Transformation to Regulatory State: The Case of Taiwan*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA, *supra* note 19, at 127, 133-34.

385. MINGUO XIANFA art. 78 (1947) (Taiwan).

386. MINGUO XIANFA art. 5, §4 (2005) (Taiwan).

judicialization because it loosens the standing requirements and expands judicial power. One of the most notable changes is the revision of standing rules prescribed in the Constitutional Interpretation Procedure Act in 1993.³⁸⁷ This revision is fundamental to the judicialization of politics in Taiwan because the KMT continuously had controlled the congress until 2016. Without the revision, the opposition parties would not have any chance to challenge unwanted policies. Furthermore, the Constitutional Court has rewritten the standing rules, thereby expanding its jurisdiction through its own constitutional interpretations.³⁸⁸ In 1995, the court expressly nullified part of the Constitutional Interpretation Procedure Act, allowing judges of lower courts to seek constitutional interpretation if they believe the law in question is unconstitutional.³⁸⁹ This has been extolled as the most important decision the Court has ever made in terms of judicial empowerment because “it definitively declares that the [court], not the Legislative Yuan, is the ultimate determiner of its own jurisdiction.”³⁹⁰ With the expansion of judicial power, the executive can no longer control the judiciary as it did during the authoritarian period.

Although judicial review is nothing new to the Constitutional Court, statistics have demonstrated that the actual use of judicial review has changed dramatically over time.³⁹¹ During the authoritarian period, judicial review was a tool for autocrats to masquerade as partners of the West and the only legitimate Chinese government, as opposed to the People’s Republic of China.³⁹² The situation has changed remarkably since democratization in both quantitative and qualitative senses: the number of cases has grown exponentially, and many are politically significant.³⁹³ The Constitutional Court has successfully transformed itself from a rubber stamp to a constitutional guardian that protects human rights and maintains separation of powers. Similar to its South Korean counterpart, the court has intervened not only in issues regarding normal politics, but also in controversies concerning mega-politics, at least in some realms.

387. Sifa Yuan Da Faguan Shenli Anjian Fa [Constitutional Interpretation Procedure Act], art. 5 (1993) (Taiwan).

388. See YEH, *supra* note 379, at 162-65.

389. J.Y. Interpretation No. 371 (1995) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=371.

390. See GINSBURG, *supra* note 15, at 138-39.

391. See Chien-Chih Lin, *Constitutions and Courts in Authoritarian Regimes: China and Pre-democratic Taiwan in Comparison*, 14 INT’L CONST. L. 351, 363 (2016).

392. *Id.* at 363-65.

393. See GINSBURG, *supra* note 15, at 124-28.

The paradigmatic example in Taiwan is that the Constitutional Court has essentially repealed constitutional amendments twice, in Interpretations No. 261 and No. 499.³⁹⁴ In Interpretation No. 261, the Constitutional Court demanded direct national elections in direct contradiction to the Temporary Provisions, a quasi-constitutional amendment enacted during the authoritarian period. In Interpretation No. 499, the scope of judicial review reached its zenith when the Constitutional Court struck down the 1999 Constitutional Amendment, which was passed by a democratically elected National Assembly after political liberation. The Constitutional Court invoked the “basic structure doctrine,”³⁹⁵ which had never been articulated before this decision. In a sense, it is similar to what the South Korean Constitutional Court did in the relocation-of-the-capital case: the arguments in both cases were unprecedented in domestic constitutional jurisprudence, which evinces the broad discretion of the judiciary.

In Interpretation No. 627,³⁹⁶ moreover, the Constitutional Court encountered a political maelstrom involving the scope of presidential immunity and state secret privilege. Due to a series of scandals, opposition parties attempted to impeach the president in 2006, but in vain.³⁹⁷ The failure of impeachment did not quash the political conflicts, but fueled more antagonism. Opposition parties believed that former President Chen abused his presidential immunity and privilege to protect himself and his family from investigation.³⁹⁸ Given such a political atmosphere, the Constitutional Court intentionally delivered a unanimous opinion, in which it elaborated the purposes and scope of the two privileges and created a special tribunal to tackle related controversies without the delegation of any law.³⁹⁹

394. J.Y. Interpretation No. 261 (1990) (Taiwan), http://www.judicial.gov.tw/constitutional-court/en/p03_01.asp?expno=261; J.Y. Interpretation No. 499 (2000) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

395. For the introduction of this doctrine, see Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations* 2, 50 CORNELL INT’L L.J. (forthcoming 2017), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2860442; SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 1-42 (2009); Yaniv Roznai, *Unconstitutional Constitutional Amendment — The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 691-93 (2013).

396. J.Y. Interpretation No. 627 (2007) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=627.

397. Dafydd J. Fell, *Parties and Party Systems*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY TAIWAN, *supra* note 374, at 87, 98.

398. *Id.*

399. J.Y. Interpretation No. 627, *supra* note 396.

In addition to the ruling, three points merit notice. First, the Constitutional Court was willing to step into the political thicket during a period when social cleavage and political gridlock were most intense. Second, this is a clear example of judicial legislating, yet no one seriously questioned its legitimacy. Finally, politicians from both parties were satisfied with the solution notwithstanding their antithetical stances. As a result of this decision, the authority of the Constitutional Court as the arbiter of political conflicts has been firmly entrenched.

Moreover, the reach of judicialization includes issues that define the nationhood and national identity of Taiwan. In the past, Taiwan was regarded as a province, rather than a country, under the one-China policy, which explained, inter alia, why “national” elections could not be held in Taiwan during the authoritarian period. Since the 1997 constitutional amendment and Interpretation No. 467, this myth has been dispelled, and Taiwan is no longer recognized as a province,⁴⁰⁰ but as a synonym for the Republic of China. Relatedly, due to the ambiguous relationship between China and Taiwan, the government enacted the Act Governing Relations between the People of the Taiwan Area and the Mainland Area, which has given birth to a myriad of controversies in Interpretations No. 618, 692, 710, and 712.⁴⁰¹ In these decisions, the Constitutional Court justified statutory distinctions that distinguish people born in Taiwan from those born in China but converted to Taiwanese nationality, even though this is discrimination based on national origin.⁴⁰² While never clearly articulating the relationship between China and Taiwan, these interpretations implicitly recognize that the two jurisdictions are separated and controlled by different sovereign governments.

Given its activism in the domain of mega-politics, it is unsurprising that the Constitutional Court also intervenes in the process of ordinary policymaking. In 1987, the Constitutional Court announced that admin-

400. For detailed discussion, see Wen-Chen Chang, *Public Interest Litigation in Taiwan: Strategy for Law and Policy Changes in the Course of Democratization*, in PUBLIC-INTEREST LITIGATION IN ASIA, *supra* note 138, at 136, 145.

401. J.Y. Interpretation No. 618 (2006) (Taiwan), http://www.judicial.gov.tw/constitutional-court/en/p03_01.asp?expno=618; J.Y. Interpretation No. 692 (2011) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=692; J.Y. Interpretation No. 710 (2013) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=710; J.Y. Interpretation No. 712 (2013) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=712.

402. See, e.g., J.Y. Interpretation No. 618, *supra* note 401.

istrative regulations should not bind judges of lower courts,⁴⁰³ a decision that strengthens judicial independence vis-à-vis the executive.⁴⁰⁴ Since then, judicial control over both the executive and legislative discretion has tightened⁴⁰⁵ in a series of cases that involves the so-called “*besonderes Gewaltverhältnis* (special-power relations).”⁴⁰⁶ Since political liberation, the power equilibrium between the political branches and the judiciary has shifted in favor of judicial power. The Constitutional Court has dismantled the legal prohibitions that excluded certain occupations from due process of law.⁴⁰⁷ Furthermore, similarly to the apex courts in Hong Kong and South Korea, the Constitutional Court has examined issues concerning legislative self-governance, an area preserved for legislators.⁴⁰⁸ In the aforementioned Interpretation No. 499, the Constitutional Court revoked the constitutional amendment partly on the ground of procedural defects.⁴⁰⁹ Other cases concerning legislative self-governance include Interpretation No. 342⁴¹⁰ and No. 381.⁴¹¹

In addition to annulling unconstitutional legislation, the Constitutional Court has also replaced void laws with its own preferences without waiting for further statutory amendments. In addition, the court in Interpretation No. 677 effectively ordered the executive to release prisoners after nullifying related regulations of the Prison Act.⁴¹² In

403. J.Y. Interpretation No. 216 (1987) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=216.

404. GINSBURG, *supra* note 15, at 140-41.

405. Yeh, *supra* note 384, at 133-34. *But see* Cheng-Yi Huang, *Judicial Deference to Legislative Delegation and Administrative Discretion in New Democracies: Recent Evidence from Poland, Taiwan, and South Africa*, in *COMPARATIVE ADMINISTRATIVE LAW* 466, 471-74 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

406. In the past, the government often invoked this concept to deprive certain groups of people, such as officials, soldiers, students, and inmates, of their legal remedies. From the perspective of checks and balances, this is executive expansion at the expense of judicial power.

407. J.Y. Interpretation No. 430 (1997) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=430.

408. J.Y. Interpretation No. 499 (2000) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

409. *Id.*

410. J.Y. Interpretation No. 342 (1994) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=342.

411. J.Y. Interpretation No. 381 (1995) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=381.

412. J.Y. Interpretation No. 677 (2014) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=677.

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Interpretation No. 603,⁴¹³ it was dragged into a policy controversy in which the government wanted to collect the fingerprint of every citizen. Despite the obvious violation of privacy, public opinion favored this policy after a series of appalling crimes.⁴¹⁴ Nonetheless, the Constitutional Court struck it down on the grounds of proportionality and violation of information privacy.⁴¹⁵ This is a clear example of the judiciary acting in a counter-majoritarian way because most people would rather trade their privacy for safety. Interpretation No. 400⁴¹⁶ is the final case that merits mentioning. In this case, the Constitutional Court invalidated two executive regulations concerning eminent domain and asked the government to compensate the proprietors whose property rights were either expropriated or limited.⁴¹⁷ Ostensibly, it looks like a good decision from the perspective of property rights; in reality, it has never been implemented because implementation would be prohibitively costly.⁴¹⁸ Despite the ironic result, Interpretation 400 shows that the Constitutional Court has its say even over the distribution of the national budget, a domain in which judges lack both expertise and democratic mandate in Taiwan.

Notwithstanding its progressiveness in everyday politics and megapolitics, the Constitutional Court is conservative in the field of restorative justice, compared with its South Korean counterpart. Since the court delivered its first opinion in Interpretation No. 272⁴¹⁹ in 1991, four years after democratization, it has bifurcated its approach to reflect this selective conservatism. On the one hand, it has recognized and enlarged the scope of monetary compensation to victims during the period of white terror; on the other hand, it endorsed the constitutionality of martial law and justified military trials for those who were not in service on grounds of national emergency and necessity.⁴²⁰ This

413. J.Y. Interpretation No. 603 (2005) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=603.

414. *Id.*

415. *Id.*

416. J.Y. Interpretation No. 400 (1996) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=400.

417. *Id.*

418. See Yun-Chien Chang, *Eminent Domain Law in Taiwan: New Law, Old Practice?* 1-2 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 569, 2016).

419. J.Y. Interpretation No. 272 (1991) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=272.

420. Cf. Naiteh Wu, *Transition without Justice, or Justice without History: Transitional Justice in Taiwan*, 1-1 TAIWAN J. DEMOCRACY 73, 89-90 (2005) (generally discussing how the judicial branch tackles the issue of transitional justice).

stance has become a precedent and continues to control future opinions. Given the composition of the Constitutional Court (most justices were KMT members) and the social chasm between pro-independence and pro-unification camps, it is understandable that the Constitutional Court has tried to strike a balance between seeking restorative justice and tolerating crimes committed in the exceptional circumstances during the authoritarian period. The result is that, alas, no perpetrator has ever been identified and held responsible for the gross violation of human rights in the past.

C. *The Judicialization of Politics from Below*

In Taiwan, political liberalization and the protection of the right of association have resulted in a mature civil society. The number of NGOs has grown rapidly, and many of them have triggered the rise of legal mobilization in Taiwan. The trend of judicialization of politics from below is more understandable given the political environment in Taiwan. After democratization, the continual dominance of the KMT administration rendered the political branches unwilling to tackle certain issues, such as restorative justice as mentioned above. Even after the first party turnover in 2000, political gridlock still paralyzed the government for a long time. In this circumstance, interest groups, cause lawyers,⁴²¹ and NGOs widely adopted litigation as part of their strategies to pursue their preferred policies.⁴²² It follows that the Constitutional Court has become the second forum for policymaking not only for politicians, but also for lay people.⁴²³

Official statistics have proven the rise of judicialization of politics from below.⁴²⁴ In the first three nine-year terms of judge tenure, more than ninety-five percent of the decisions were filed by government

421. See Carrie Menkel-Meadow, *The Cause of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 33-37 (Austin Sarat & Stuart Scheingold eds., 1998).

422. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2003).

423. For an overview of the social movements in Taiwan, see generally Hsin-Huang Michael Hsiao, *The Rise of Social Movements and Civil Protests*, in POLITICAL CHANGE IN TAIWAN 57 (Tun-jen Cheng & Stephan Haggard eds., 1992); Hsin-Huang Michael Hsiao, *Social Movements and Civil Society in Taiwan: A Typological Analysis of Social Movements and Public Acceptance*, 11 COPENHAGEN J. ASIAN STUD. 7 (1996) (introducing social movements in Taiwan since 1980s).

424. Justices of the Constitutional Court, *Statistics of the First to Sixth Chancellor*, <http://www.judicial.gov.tw/constitutionalcourt/uploadfile/E100/%E7%AC%AC%E4%B8%80%E5%B1%86%E8%87%B3%E7%AC%AC%E5%85%AD%E5%B1%86%E5%A4%A7%E6%B3%95%E5%AE%98%E4%BD%9C%E6%88%90%E8%A7%A3%E9%87%8B%E4%B9%8B%E7%B5%B1%E8%A8%88%E6%95%B8%E6%93%9A%E8%A1%A8.htm> (last visited Oct. 15, 2017).

officials instead of citizens.⁴²⁵ After democratization, this percentage dropped dramatically from forty-nine percent (in the fourth term) to twenty-five percent (in the fifth term), and the trend does not seem to be stopping even after the recent second party turnover: citizens occupied the lion's share of the Constitutional Court's docket (ninety-six percent) in 2009.⁴²⁶ Among these cases, many are filed either by or with the assistance of NGOs.⁴²⁷ The Awakening Foundation and the Judicial Reform Foundation, for example, contributed to several decisions that are essential to constitutional development in Taiwan.⁴²⁸

The renovation of Taiwan's Civil Code, which used to be rife with gender discrimination, is the most remarkable example of public interest litigation. In the past, women's right of property, right to inherit, and parental right, to name just a few, were unconstitutionally limited in the civil code.⁴²⁹ In cases brought by women's organizations challenging the code provisions, the Constitutional Court has struck down several articles of the civil code on the ground of gender equality, including in Interpretations No. 365, 410, and 452.⁴³⁰ On May 24, 2017, moreover, the Constitutional Court of Taiwan (the TCC) issued Interpretation No. 748, declaring part of the Civil Code, which in essence prohibits same-sex marriage, unconstitutional.⁴³¹ This is a paradigmatic example of the judicialization of politics. At that time, it had been polemic whether the Constitutional Court should hear the case, because the legislature had already tackled the same issue and submitted several legislative drafts. It is not unreasonable to argue that the Constitutional Court should brake until the political branches have made their preliminary proposals from the perspective of democratic accountability. The Constitutional Court, however, not only heard the cases and required the legislature to amend the Civil Code within two years, but also plainly legislated, prescribing that same-sex couples may marry according to the current family chapter of the Civil Code should the legislature procrastinate or resist this judicial mandate.

425. *Id.*

426. Justices of the Constitutional Court, Judicial Yuan, R.O.C., *Statistics*, <http://www.judicial.gov.tw/constitutionalcourt/uploadfile/E100/92%E5%B9%B4%E8%87%B398%E5%B9%B4%E5%B9%B4%E8%A1%A8.doc> (last visited Oct. 25, 2017).

427. See Chang, *supra* note 400, at 137-46.

428. See *id.* at 142-44, 147.

429. *Id.*

430. *Id.*

431. J.Y. Interpretation No. 748 (2017) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/p03_01_1.asp?expno=748.

Another example involves environmental protection. In the past, the natural environment in Taiwan had been sacrificed for a variety of goals, such as political needs and trade surplus,⁴³² and scholars have advocated that courts should pay closer attention to environmental impact assessment because of political malfunction and minority bias.⁴³³ Administrative courts in Taiwan have responded to this call and suspended some government-approved construction projects that were allegedly beneficial to short-term local economic prosperity at the expense of sustainable development.⁴³⁴ In sum, with the progress of the bottom-up judicialization of politics, many social reforms have been implemented through judicial decisions first, and then followed by the legislature and the executive later.

D. *Explaining the Judicialization of Politics in Taiwan*

Similar to the situation in South Korea, many political and institutional factors in Taiwan facilitate judicial expansion, and the judicialization of politics is indeed vibrant in this island nation. For starters, Taiwan has founded a specific constitutional court to deal with constitutional issues. This prevents the constitutional court from being entangled with trivial cases. Judicial review in Taiwan is abstract review, and justices themselves have made it more accessible by allowing judges of lower courts to bring their cases to the Constitutional Court. Moreover, the Constitutional Court has the power to dissolve political parties and impeach the president via constitutional amendments. Both ancillary powers make the judiciary more politically influential.

Furthermore, Taiwan is a stable democracy that has experienced party turnover three times in the past thirty years after the lifting of Martial Law. The presidential system together with strong opposition parties have led to endless political conflicts and impasse. Whenever political negotiation is impossible, constitutional litigation becomes the only solution available. Compared with Hong Kong and Singapore, this political reality allows more room and opportunities for judicial expansion. Political deadlock not only triggers the judicialization of politics from above, but also stimulates legal mobilization from below,

432. See Jiunn-rong Yeh, *Institutional Capacity-Building Toward Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization*, 6 DUKE J. COMP. & INT'L L. 229, 250-54 (1997).

433. See Chung-Lin Chen, *Judicial Review of Environmental Impact Assessment: From the Perspective of Comparative Institutional Analysis*, 14 ACADEMIA SINICA L. REV. 107, 142-56 (2014).

434. *Id.*

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because the normal political channel to effect social change has been closed. Because the political branches are stymied, the third branch with newly vested powers becomes a reasonable solution. The revision of the civil code mentioned above suggests that it is sometimes more efficient to change the status quo through unelected judges than elected representatives.

Admittedly, although these institutional and political factors explain the rise of judicialization of politics in Taiwan, the analyses are somewhat technical and insufficient in the sense that they lack comparative and historical perspectives. Nor can they explain the divergent development of judicial expansion in countries with similar political and institutional features. For example, constitutional courts in both South Korea and Taiwan formally possess a myriad of similar judicial weapons, but their attitudes towards transitional justice vary significantly. Moreover, both Hong Kong and Singapore inherited a common-law legacy from the same colonizer, but the development of legal mobilization is considerably different. To unpack the puzzles, a comparison of the Four Asian Tigers is necessary.

VI. THE FOUR ASIAN TIGERS IN COMPARISON

Although all four jurisdictions in this Article are economically developed, the strength of judicial power and the development of judicialization of politics vary to a significant extent. Overall, there is a tendency towards the judicialization of politics in the Four Asian Tigers: judicial empowerment has provided a rich toolkit for judges to intervene in the process of policymaking. Courts in South Korea, Taiwan, and, to a lesser extent, Hong Kong, all control their own jurisdictions by interpreting standing rules broadly. Some issues that were immune from judicial scrutiny are now under the gauntlet of judicial review. For example, the specter of judicial censure hovers over the legislative process in all jurisdictions except for Singapore. On the other hand, new topics, such as environmental protection, cannot escape judicial review, and several courts in these jurisdictions have suspended government projects at the request of social groups.⁴³⁵ In contrast with judicial expansion, executive discretion is shrinking in many of these jurisdictions.

Specifically, the Four Asian Tigers can be categorized into three groups. First, courts in both South Korea and Taiwan have tackled and

435. Chung-Lin Chen, *Institutional Roles of Political Processes, Expert Governance, and Judicial Review in Environmental Impact Assessment: A Theoretical Framework and a Case Study of Taiwan*, 54 NAT. RESOURCES J. 41, 63-65 (2014).

solved issues concerning mega-politics, such as national identity, restorative justice, and the impeachment of presidents. Given that the greater includes the lesser, it should not be surprising that both judiciaries have repeatedly been involved, voluntarily or not, in the process of policymaking. Many national policies have been suspended, revised, or even repealed as a result of judicial mandate. Furthermore, courts in the two jurisdictions apply implied constitutional doctrine to invalidate impugned laws. In South Korea, the Constitutional Court created customary constitutional law to suspend a national project;⁴³⁶ in Taiwan, the Constitutional Court applied the basic structure doctrine to strike down a constitutional amendment.⁴³⁷ These examples suggest that the judicialization of politics in the two countries is no less intensive than in western countries. The vibrancy of legal mobilization in these two countries lends further support to this contention. The courtroom becomes another battlefield for not only politicians, but also the public, to pursue preferred policies.

By contrast, Hong Kong is less developed in this regard. The Court of Final Appeal did try to judicialize mega-politics, claiming that it had the final word over defining the composition and identity of Hong Kong people in the right-to-abode case and that it could override national statutes enacted by the NPCSC when necessary.⁴³⁸ The Chinese government vehemently rejected both assertions and forced the CFA to retreat from the domain of mega-politics, leaving mega-politics to the political branches.⁴³⁹ Despite its obedience in mega-politics, the CFA still intervenes in cases involving lower-level politics. Thus, insofar as mega-politics and sovereignty are not at issue, judicial independence, authority, and popularity are beyond doubt in Hong Kong. This also explains why social groups and cause lawyers continue to adopt litigation as their strategy because the judiciary is capable and trustworthy in other domains. Compared with South Korea and Taiwan, however, the judicialization of politics is less developed in Hong Kong, taking place only in certain spheres. It may be better called the judicialization of “regional politics”—politics that do not involve Hong Kong’s status. Another issue is that the scope of “one country, two systems” is not clearly defined, which Beijing may exploit in the future in order to

436. Kim, *supra* note 334, at 80; *see also* Constitutional Court [Const. Ct.], 2004Hun-Na1, May 14, 2004 (S. Kor.).

437. J.Y. Interpretation No. 499 (2000) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499.

438. *Ng Ka Ling v. Director of Immigration*, [1999] 2 H.K.C.F.A.R. 4 (C.F.A.).

439. Wacks, *supra* note 151, at 3.

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further constrain judicial power even in areas in which the Hong Kong judiciary has traditionally enjoyed independence.

At the lowest level of development, the judicialization of politics is dormant in Singapore such that it is more accurately called de-judicialization of politics. Although the judiciary in Singapore has the power of judicial review, that power has been limited in scope, and the judiciary has not been willing to assert itself.⁴⁴⁰ Unlike its counterpart in Hong Kong, the Singapore judiciary employs an interpretive methodology that is mechanical and parochial. Political leaders still faithfully implement judicial decisions inconsistent with their preferences, but they rewrite related statutory provisions immediately to clip the wings of the judiciary in the future. In this circumstance, the judiciary can wield its power only in politically trivial cases. Although the political branches rarely openly interfere with judicial decision-making, it is doubtful how meaningful judicial independence is if the judiciary will rule in favor of the political branches anyway. It follows that neither politicians nor the public take the judiciary into account when pursuing their political agenda. Table 1 illustrates the issues and channels of the judicialization of politics in the four jurisdictions.

TABLE 1.
THE JUDICIALIZATION OF POLITICS IN THE FOUR ASIAN TIGERS

	Issues		Channels	
	Mega-politics	Normal Politics	From Above	From Below
South Korea	O	O	O	O
Taiwan	O	O	O	O
Hong Kong	X	O	X	O
Singapore	X	X	X	X

Source: Author.

In addition to the institutional factors analyzed above in Parts I to IV, the different political environments in each country explain in part the variance in the judicialization of politics. In South Korea and Taiwan, elections regularly are held, and the competitions are fair and intense in general.⁴⁴¹ Although there are electoral disputes from time to time, these controversies are resolved by the judiciary, whose decisions are accepted by the parties involved. People are accustomed to party

440. See discussion *supra* Part III.

441. See discussion *supra* Parts IV, V.

turnover, which has taken place multiple times.⁴⁴² Under these circumstances, the judicialization of politics will be more common because it will be more onerous for the divided political branches to punish the judiciary for any unfavorable rulings.⁴⁴³ In contrast with the political fragmentation in these two regimes, the situation in Hong Kong is trickier. On the one hand, the legislative branch comprises two parts, functional and geographical constituencies, and the former part is not popularly elected.⁴⁴⁴ The chief executive is not popularly elected either.⁴⁴⁵ On the other hand, competition between the pro-establishment and pro-democracy camps is real, and the executive branch cannot effectively control the congressional minority.⁴⁴⁶ Moreover, there is always a “big brother” watching closely from Beijing.⁴⁴⁷ In this peculiar political context, it is explicable that the judicialization of politics has occurred only in a limited space in Hong Kong. In Singapore, where the PAP has ruled continuously for six decades, judicial power is strictly constrained. Although elections are regularly and openly held, other electoral institutions such as the Group Representation Constituency have been criticized as unfair to opposition parties—not to mention that there are concerns about voting secrecy.⁴⁴⁸ In a word, conventional wisdom, which maintains that political instability stimulates judicial expansion, is born out in the context of the Four Asian Tigers.

However, conventional wisdom regarding political fragmentation explains only why judicialization in South Korea and Taiwan is more intense than in Hong Kong and Singapore, even though all four jurisdictions are economically developed. But the study of the Four Asian Tigers forces us to ask a deeper question: why the judicialization of politics is more intense in some countries but not in others with a similar power configuration. Parts I to IV explain the emergence of judicialization of politics in the four jurisdictions respectively, but they do not provide a comprehensive answer.

In this study, South Korea and Taiwan form an illuminating comparison because many of their political and institutional designs are

442. *Id.*

443. See Georg Vanberg, *Establishing and Maintaining Judicial Independence*, in THE OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 25, at 99, 103-06.

444. XIANGGANG JIBEN FA Annex II.

445. XIANGGANG JIBEN FA Annex I.

446. WONG, *supra* note 43, at 97-103.

447. XIANGGANG JIBEN FA art. 45, §1.

448. See *supra* note 182 and accompanying text.

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comparable. To begin with, both were colonized by Japan before World War II.⁴⁴⁹ After the Japanese colonization, both were ruled by authoritarian regimes for nearly five decades.⁴⁵⁰ Both belong to the third wave of young democracies in the 1980s, and both have gone through the two-turnover test.⁴⁵¹ Institutionally speaking, the two countries are also similar. Each has a constitutional court that tackles specifically constitutional issues.⁴⁵² The power of judicial review together with other ancillary powers, including the power to dissolve political parties and adjudicate impeachment cases, is expressly prescribed in their constitutions.⁴⁵³ Government agencies, judges of lower courts, and citizens all have standing to petition the constitutional courts.⁴⁵⁴ Finally, both essentially adopt the presidential system in which the president is the center of political power.⁴⁵⁵ However, the Taiwanese Constitutional Court is equipped with other powers that are more favorable to the development of judicialization of politics: unlike its Korean counterpart, the Taiwanese Constitutional Court has both abstract and concrete review powers.⁴⁵⁶ This makes it potentially more accessible (because parliamentary minorities have standing in Taiwan but not in South Korea) and powerful (as the power of abstract review is essentially a power of legislation).⁴⁵⁷ In a nutshell, it is plausible to presume that the judicialization of politics should be more frequent in Taiwan than in Korea, formally speaking.

Similarly, Hong Kong and Singapore are comparable because both share many political and institutional features. Politically, both are semi-authoritarian societies in the sense that elections are regularly held, but they are rife with problems such as gerrymandering or functional constituencies.⁴⁵⁸ Party alternation seems to be unlikely in

449. Gold, *supra* note 374, at 36; GINSBURG, *supra* note 15, at 208-09.

450. Gold, *supra* note 374, at 36; GINSBURG, *supra* note 15, at 208-09.

451. Gold, *supra* note 374, at 36; GINSBURG, *supra* note 15, at 213-17.

452. Jacobs, *supra* note 380, at 57-66; GINSBURG, *supra* note 15, at 213-17.

453. GINSBURG, *supra* note 15, at 124, 218.

454. *Id.* at 123, 218.

455. See Jiunn-rong Yeh, *Presidential Politics and the Judicial Facilitation of Dialogue between Political Actors in New Asian Democracies*, 8 INT'L J. CONST. L. 911, 912-13 (2010).

456. LIN ZIYI, YE JUNRONG, HUANG ZHAOYUAN & ZHANG WENZHEN, XIANFA: QUANLI FENLI 43 (2003).

457. See STONE SWEET, *supra* note 4, at 51, 60-63 (arguing that "other things being equal, systems that contain abstract review ought to experience more judicialization than systems that do not" and that "when [a constitutional court] exercises abstract review authority, it operates as a separate, but specialized, legislative chamber").

458. See discussion *supra* Parts II & III.

the foreseeable future, although competition between different parties is real in Hong Kong. Both are tiny jurisdictions in terms of territory and population, a demographic characteristic that reduces the agency cost that results from bureaucracy. More importantly, judicial decisions in both jurisdictions have been embarrassingly overruled by the governments.⁴⁵⁹ Although this is hardly a political attack, the chilling effect cannot be overemphasized.

In terms of institutional design, both are former British colonies that have been immersed in common-law tradition. Indeed, the Privy Council of the United Kingdom continued to be the court of final resort in both jurisdictions until the 1990s.⁴⁶⁰ Therefore, judicial review in both regimes is concrete review, as opposed to abstract. Unlike South Korea and Taiwan, neither Singapore nor Hong Kong has established a constitutional court that tackles specifically constitutional cases. Also, both are located in Asia where there is no regional court, such as the Inter-American Court of Human Rights or European Court of Justice. Namely, there is no “boomerang effect”⁴⁶¹ that may cause domestic judicial activism.

This Article suggests that, through the prism of historical institutionalism, we may better understand the variances of judicial performance in the judicialization of politics, given the political and institutional similarities between South Korea and Taiwan on the one hand, and between Hong Kong and Singapore on the other.⁴⁶² Starting from the comparison between South Korea and Taiwan, courts in both regimes are equipped with many similar structural and institutional conditions that provide rich soil for the judicialization of politics, and they have functioned progressively, compared with other Asian judiciaries. Nonetheless, the Korean constitutional court is more assertive in the domain

459. See discussion *supra* Parts II.C & III.B.

460. See discussion *supra* Part III.A. See also Chen, *supra* note 63, at 634.

461. See Kathryn Sikkink, *The Transnational Dimension of the Judicialization of Politics in Latin America*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA*, *supra* note 8, at 263, 263-78 (introducing the concept of the boomerang effect); Pilar Domingo, *Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America*, 11 *DEMOCRATIZATION* 104, 109-10, 121-22 (2004).

462. Certainly, there are some conceptual affinities and overlaps between historical institutionalism and other institutional theories, such as rational choice and sociological institutionalism. See Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 *ANN. REV. POL. SCI.* 369, 372-84 (1999) (comparing historical institutionalism with rational choice institutionalism). While focusing on the impact of historical developments and critical junctures on the court systems and judges within, this Article does not deny the influence of other elements, such as the calculus of politicians or cultural backgrounds, emphasized in other institutional theories.

of transitional justice than its Taiwanese counterpart, which was established by the same party that violated human rights during the authoritarian period. To be more specific: many South Korean politicians did not trust the ordinary courts at the founding stage because most judges of ordinary courts at that time received legal education during the Japanese colonial period, and the judicial system continued to function before and after World War II, including during U.S. occupation.⁴⁶³ Namely, both politicians and the public associated the ordinary courts with the colonial past that Koreans wanted to get rid of after the end of colonization.⁴⁶⁴ Therefore, they established a brand new Korean Constitutional Court and staffed it through a completely different mechanism so that the Constitutional Court could function normally without the burden of the colonial past.

This is not the case in Taiwan, however. The Constitutional Court was founded by the KMT in Nanjing, China in an era of turmoil.⁴⁶⁵ Following the KMT, the Constitutional Court moved to Taiwan after promulgating its first two decisions in China.⁴⁶⁶ During the authoritarian period, it functioned as a constitutional councilor of the dictators and, more importantly, gave the dictatorship the cloak of legality.⁴⁶⁷ This was particularly crucial in a period when the Republic of China in Taiwan was competing with the People's Republic of China for the title of the sole legitimate Chinese government.⁴⁶⁸ Because the Constitutional Court itself was an integral part of the one-China paradigm, it became the veneer of legitimacy of the authoritarian regime. Moreover, all important government positions were staffed by people in proportion to the population in each province before the civil war during the authoritarian period, with an eye to maintaining the façade that the government represented all Chinese people (not only Taiwanese people).⁴⁶⁹ This scenario that government positions were staffed almost exclusively with people from mainland Chinese had no exception with the composition of the Constitutional Court. Most Justices before the sixth term were KMT members; some of them were even

463. *Id.*

464. HAHM & KIM, *supra* note 300, at 177-80.

465. GINSBURG, *supra* note 15, at 124.

466. *Id.*

467. Jacobs, *supra* note 380, at 53.

468. See Chien-Chih Lin, *Constitutions and Courts in Authoritarian Regime: China and Pre-Democratic Taiwan in Comparison*, 14 INT'L J. CONST. L. 351, 361-62 (2016).

469. See Wang Fu-Chang, *A Prolonged Exile: National Imagination of the KMT Regime in Postwar Taiwan*, 52 ORIENS EXTREMUS 137, 149, 153 (2013).

members of the intelligence agency.⁴⁷⁰ In fact, most justices who participated in Interpretation No. 272, the first constitutional-court decision that directly involved transitional justice, were KMT members.⁴⁷¹ Unsurprisingly, they recognized the necessity and legitimacy of the martial law and related regulations.

In addition, institutional development and evolution are always influenced by the surrounding sociopolitical context, and the development of the judicial system is no exception. Although both Taiwan and South Korea underwent political liberation in the late 1980s, the democratizing processes in the two regimes were distinct, and the distinctness to some extent determines the understanding and implementation of transitional justice. In South Korea, democratization was made possible through the cooperation between the military and grassroots people, the so-called transplacement model, in which neither side had enough power to unilaterally orchestrate the pace and process of democratization.⁴⁷² One feature of this model is that former authoritarian rulers would have little chance to stay in power after regime change, even if there is no massive lustration.⁴⁷³ This decreases the difficulty of pursuing transitional justice. Conversely, in Taiwan, the former ruling party, the KMT, launched democratization and remained in power after political liberation. In fact, it won a landslide victory in the first direct presidential election.⁴⁷⁴ Under this political atmosphere, transitional justice in Taiwan has never been implemented thoroughly. The government has repeatedly apologized for gross past human rights violations, but no perpetrators were identified or held responsible for the infringements.⁴⁷⁵ Furthermore, given the stasis of economic growth after the 2000s, there was nostalgia for the authoritarian era that was seen as more efficient.⁴⁷⁶ Moreover, the enterprise of transitional justice and truth finding had been stigmatized as revenge toward the former ruling party.⁴⁷⁷ This rendered the whole project unpopular because political antagonism after the first

470. See Heng-Wen Liu (劉恆斌), *Danghua Sifa dui Zhanhou Taiwan Sifa Renshi de Yingxiang* (黨化司法對戰後台灣司法人事的影響), (Jan. 12, 2017) (unpublished manuscript) (on file with author).

471. *Id.*

472. See HUNTINGTON, *supra* note 24, at 151-63.

473. *Id.*

474. Jacobs, *supra* note 380, at 57.

475. Jau-Yuan Hwang, *Transitional Justice in Postwar Taiwan*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY TAIWAN, *supra* note 374, at 169, 176.

476. *Id.* at 178.

477. *Id.* at 179.

party turnover became white heat, and the public was tired of ideological contests. Given the institutional endurance of the Constitutional Court and social atmosphere, it is little wonder that the Taiwanese Constitutional Court was lukewarm if not resistant to transitional justice.

From this perspective, democratic transition in the 1980s was the critical juncture that shaped the constitutional courts and the development of judicialization of politics in both South Korea and Taiwan. The different processes of democratic transition determined, at least indirectly, judicial attitudes in the field of restorative justice. In South Korea, the decisions to grant the power of judicial review to a new constitutional court, rather than the old judiciary, and to distribute the appointment power to all three branches, fundamentally structured the way in which judicial review operates. All South Korean justices are nominated to a new tribunal through a new mechanism under a new constitutional order.⁴⁷⁸ This new democratic mandate symbolizes a clear-cut departure from the authoritarian past and requires the Constitutional Court to be more assertive in protecting human rights and pursuing justice.

In Taiwan, by contrast, the old ruling party KMT launched democratization, and justices were appointed by the same President.⁴⁷⁹ Some old justices continued to serve on the bench after democratization. By accepting the appointment, the justices in Taiwan implicitly recognized the legitimacy of the old ruling party and its reign during the authoritarian period. Had democratization in Taiwan not been achieved through a top-down approach, the KMT might not have stayed in power after political liberation or had the opportunity to appoint justices of the Constitutional Court unilaterally. It follows that these pro-KMT justices might not have had the chance to set up conservative precedents that bind later justices, who are perhaps more liberal. Some may argue that Taiwan's Constitutional Court has been cautious long after political liberation. Nevertheless, the rationale of path dependence⁴⁸⁰ applies here. The institution of judicial precedent and the doctrine of *stare decisis* best embody the logic of path dependence in judicial decision-making. At the beginning, it is possible that the judiciary would have reached an alternative decision had the composi-

478. GINSBURG, *supra* note 15, at 218.

479. *Id.* at 119.

480. See PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 20-22, 44-48 (2004) (articulating the four features of path dependence: multiple equilibria, contingency, timing and sequencing, and inertia).

tion of the tribunal been different. Once the precedent is set, however, it becomes much more burdensome for later justices to overrule. This explains why Taiwan's Constitutional Court, constrained by Interpretation No. 272, simply recognized and enlarged the scope of monetary compensation in later decisions without reaching a more liberal conclusion.

Similarly, historical institutionalism better explains the judicialization of politics from below in Hong Kong, but not in Singapore. Scholars have suggested that after nearly one-and-a-half centuries of reign, some British legacies have been deeply rooted in Hong Kong society; and the rule of law is one of the most important gifts the British left behind.⁴⁸¹ The rule of law here includes not only procedural due process of law, but also substantive values, such as the protection of human rights, judicial independence, and the separation of powers. "This important legacy has been taken up by civil society to advance their causes when political opportunities shifted to the judiciary during the process of the sovereignty transition in the 1990s."⁴⁸² More concretely, the legacy of the rule of law has cultivated a strong legal complex, including independent and liberal judges as well as public interest lawyers.⁴⁸³ Judges in Hong Kong have become accustomed to exercising the power of judicial review at least since the passage of the Hong Kong Bill of Rights Ordinance in 1991; many have said the practice started long before that.⁴⁸⁴ Whatever the precise date was, it is important that Hong Kong judges are used to checking the political branches not only in procedural requirements but also in substantive matters. Because the practice of judicial review predates the establishment of the HKSAR, path dependence has deterred the HKSAR government from overly intervening. From this perspective, the Tiananmen Incident in 1989 is the critical juncture⁴⁸⁵ that accidentally gave birth to the bottom-up judicialization of politics in Hong Kong. Facing the motherland that just brutally slaughtered hundreds of peaceful protesters and would unite Hong Kong in a few years, people in Hong Kong had no choice but to enhance judicial power, which, unlike the political branches, is more independent of Beijing's interference and

481. See Ming K. Chan, *The Legacy of the British Administration of Hong Kong: A View from Hong Kong*, 151 CHINA Q. 567, 567-70 (1997).

482. TAM, *supra* note 52, at 45.

483. *Id.* at 8.

484. See Chen, *supra* note 63, at 653-55.

485. See generally Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 WORLD POL. 341 (2007).

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control, relatively speaking. The incorporation of the two covenants into the Basic Law mentioned above, which provide more legal ammunition for the courts, is one of the examples.

In contrast, the case of Singapore demonstrates another different story despite its similar historical background and formal legal institutions. On the one hand, fortunately, Singaporeans have never experienced such a bloody massacre. Unlike the Chinese Communist Party that appeared to be unpredictable and cruel to the Hong Kong people on the eve of handover, the PAP administration should be credited for much of Singapore's economic prosperity and social stability. On the other hand, unfortunately, courts in Singapore have no opportunity to enhance their clout in the political arena because people have no eager need to secure individual rights through the judicial branch. In sum, the lack of critical juncture and the achievement of the PAP render the public willing to exchange their political rights for a decent living standard and social harmony. Conversely, it is plausible to assume that judicial review, let alone the judicialization of politics, might remain silent for a long time as it did during the colonial period.

Two caveats are worth noting. First, this argument based on historical institutionalism does not exclude other plausible explanations. Like other sociopolitical events, the judicialization of politics is too complex to have one single cause. For instance, power struggle still matters. Compared with the PAP's dominance in Singapore, the political coalition in Hong Kong is more precarious and thus provides more room for judicial intervention. Moreover, legal mobilization in Hong Kong may be more rewarding from the perspective of law and economics because the Basic Law is difficult to revise. This rigidity will render judicial decisions more durable against political attacks that come from future legislators.⁴⁸⁶ In Singapore, there is essentially no difference between statutory revision and constitutional amendment in this regard given the PAP's complete dominance. Namely, legal mobilization is usually futile because related provisions can be repealed or replaced immediately, which makes victory in litigation meaningless. Second, neither does the argument imply that the British government left a rule-of-law paradise to the Hong Kong people; instead, oppression and discrimination existed before and after the handover.⁴⁸⁷ The coexis-

486. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 892-94 (1975).

487. See Chan, *supra* note 481, at 568.

tence of economic miracle, social injustice, and robust judicial review contributes to, rather than constrains, the judicialization of politics.

Furthermore, this research suggests that judicial reputation may not be as critical as conventional wisdom indicates in promoting the judicialization of politics. It is often said that higher judicial reputation galvanizes more judicial expansion because the tolerance interval⁴⁸⁸ of a prestigious court is larger than its less respected counterpart. And public support of the judiciary is composed of two parts: diffuse and specific support.⁴⁸⁹ Conceptually, the former refers to the support for the judiciary as an institution while the latter refers to support for a specific judicial output. In practice, however, the distinction between the two is not always clear-cut. A court may still secure compliance even if it occasionally delivers unpopular decisions because the diffuse support, or the reservoir of goodwill,⁴⁹⁰ will deplete only if the judiciary consistently deviates from the mainstream society for a long time. Moreover, although the highest courts in the four jurisdictions are considered more trustworthy than their political counterparts,⁴⁹¹ the degree of judicialization of politics in the four jurisdictions varies considerably. One possibility is that judicial support may be category-specific. That is, people trust and support the judiciary in certain categories of decisions but not in others. For example, courts in both Hong Kong and Singapore are equally admired for their probity, efficiency, and capability in business-related cases, but Singaporean courts have long been criticized for their obedience in politically sensitive cases. By contrast, people in South Korea and Taiwan regard their constitutional courts as guardians of fundamental rights. In Taiwan, the Constitutional Court is rated as the most suitable institution among the three branches to solve major policy controversies.⁴⁹²

488. See, e.g., Knight & Epstein, *supra* note 262, at 200-06; Epstein et al., *supra* note 262, at 127-31; Epstein & Walker, *supra* note 262, at 320-24; Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-Making*, in THE OXFORD HANDBOOK OF LAW AND POLITICS, *supra* note 25, at 34, 36-37.

489. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 22-29 (2006) (articulating how courts secure public compliance with the law); JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 43-44 (2009) (discussing theories of judicial legitimacy).

490. GIBSON & CALDEIRA, *supra* note 489.

491. See GINSBURG, *supra* note 15; YAP, *supra* note 94.

492. *Construction of the Taiwan Law Empirical Study Database Phase II Implementation Plan, Taiwan Law and Social Change Survey*, SURV. RES. DATA ARCHIVE (May 18, 2016), https://srda.sinica.edu.tw/datasearch_detail.php?id=970.

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The case of the Four Asian Tigers also supports the argument that legal transplantation cannot succeed without some indigenization.⁴⁹³ Although some scholars of law and society maintain that law is “at least sometimes insulated from social and economic change”⁴⁹⁴ and that legal migration is not only possible, but the major means of legal development,⁴⁹⁵ this is not necessarily the case in the Four Asian Tigers. From the aforementioned introduction, it is clear that formally identical institutions rooted in different soils grow differently. In South Korea and Taiwan, two former Japanese colonies where both constitutional courts are equally equipped with immense powers, judicial attitude towards certain topics varies. This happens in Hong Kong and Singapore as well.

Finally, the relationship between autocracy, democracy, and juristocracy merits elaboration from the experiences of the Four Asian Tigers. In Western societies, the rise of judicialization of politics has triggered some tension between popular sovereignty and judicial expansion. Indeed, students of constitutional law have raised serious concerns about the legitimacy of judicial review and judicial activism.⁴⁹⁶ To be sure, juristocracy is similar to autocracy in some senses; decision-makers in both regimes are not elected and hence not accountable to the people. Their terms, if not life tenure, are usually longer than that of democratically elected representatives. Hence, judges should exercise self-restraint, preferably acting like a soldier if not a mute or minimalist.⁴⁹⁷

These arguments predicate on the shaky foundation that electoral results truly represent the majority will—an assumption that faces serious challenge in most democracies because of gerrymandering, campaign finance, logrolling, and other mechanisms that may distort the policymaking process.⁴⁹⁸ Insulated from these pitfalls, the judicialization of politics may be more responsible to the public in reality than

493. Brian Z. Tamanaha, *Battle between Law and Society in Micronesia*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 584, 584-85 (Denis J. Galligan & Mila Versteeg eds., 2013).

494. William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 503 (1995).

495. See Alan Watson, *Aspects of Reception of Law* 44 AM. J. COMP. L. 335, 335 (1996). See generally ALAN WATSON, *THE EVOLUTION OF WESTERN PRIVATE LAW* (2003).

496. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 51-52, 173 (2005); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 107, 120-21 (2000); JEREMY WALDRON, *LAW AND DISAGREEMENT* 184-85, 291-94 (1999).

497. See CASS R. SUNSTEIN, *CONSTITUTIONAL PERSONAE* 10-24 (2015).

498. See Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361 *passim* (2008).

ordinary politics, even though judges are not directly accountable to the people.⁴⁹⁹ After all, most people have no political influence and may not be taken into account even if they can vote. By contrast, anyone can bring their cases and arguments to the judiciary, and judges must duly respond. Given that, the real issue then becomes which branch delivers better decisions consistent with popular will. The emergence of the welfare state further intensifies this competition because judges inevitably intervene in the distribution of resources in adjudicating cases concerning positive rights.⁵⁰⁰ Furthermore, many studies have suggested that the judiciary does pay attention to the mainstream society, even if judges are not democratically elected.⁵⁰¹ From this perspective, it is implausible to maintain that the judicialization of politics is necessarily undemocratic.

In both South Korea and Taiwan, divided governments that mirror their politically divided constituents have paralyzed the political channel and spurred many contentious issues.⁵⁰² Disappointed by the political branches, the people have no other choice but turn to courts for assistance, which explains the growth of judicialization of politics from below. In this circumstance, courtrooms have become another congressional assembly and justices another political agent of the people. Namely, the judicialization of politics complements rather than constrains the democratic process. The high popularity of constitutional courts in both regimes is telling. In this sense, juristocracy is compatible with democracy. This takes place not only in young democracies, but also in Hong Kong. Due to the lack of democratic mandate of the government, the line between the political and the judicial branches is even vaguer than it is in South Korea and Taiwan. Although Hong Kong judges are not selected through elections either, the

499. See Luís Roberto Barroso, *Reason without Vote: The Representative and Majoritarian Function of Constitutional Courts*, in DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVES ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM 71, 78-88 (Thomas Bustamante & Bernardo Gonçalves Fernandes eds., 2016).

500. See STONE SWEET, *supra* note 4, at 92-126.

501. See JACK M. BALKIN, LIVING ORIGINALISM 287-93 (2011); LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 63-64 (2006); THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 153-62 (2008); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 185 (2006); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283-86, 291-94 (1957); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 728-30 (2009); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 733-45 (2011).

502. See Yeh, *supra* note 455, at 914-30.

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tradition of the rule of law and the protection of human rights renders the judiciary closer to the grassroots people. In fact, the judicialization of politics arises in Hong Kong partly because the regional government is undemocratic and controlled by one of the most powerful autocracies in the world. In this light, what limits the judicialization of politics in Hong Kong is the undemocratic HKSAR and the Beijing government, instead of the counter-majoritarian difficulty.⁵⁰³ This is more evident in Singapore, where there is almost no judicial expansion because of the political constraint.

In sum, roughly speaking, the level of judicialization is in proportion to the level of democracy in the Four Asian Tigers: South Korea and Taiwan lead, followed by Hong Kong, and Singapore is the last. In a nutshell, the Four Asian Tigers support the argument that “[a] democracy with strong judicial power is unquestionably a stronger democracy.”⁵⁰⁴ Namely, an ostensibly undemocratic judiciary might be indispensable to the functioning of democracy.⁵⁰⁵ Democracy does not reject juristocracy, but autocracy does.

VII. CONCLUSION

Although all the Four Asian Tigers are economically developed jurisdictions, the degree of judicial expansion varies significantly—a state of affairs that is inconsistent with the traditional law-and-development argument. Furthermore, the study of the Four Asian Tigers poses two levels of questions: on the first level, this research confirms the conventional wisdom that political fragmentation results in judicial expansion at the expense of the elected branches. The deeper question asks why countries that share similar power configurations and institutional features manifest different faces of judicialization of politics. Through the lens of historical institutionalism, this Article suggests that the judicialization of politics is predicated not only on institutions but also on the historical development of these institutions. Hence, ostensibly similar institutions can have divergent impact on the judicialization of politics. This explains the varying performance of constitutional courts in the realm of transitional justice in South Korea and Taiwan; it also elucidates the emergence of legal mobiliza-

503. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1986).

504. CARLO GUARNIERI & PATRIZIA PEDERZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY I* (2002).

505. See ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 56 (2011).

tion in Hong Kong and the lack of it in Singapore. In addition to dispelling the myth that economic development will lead to the rule of law, the experience of the Four Asian Tigers may shed some new light on the debates of judicial reputation, legal transplantation, and East Asian constitutionalism.