Courts and Governance in Asia: Exploring Variations and Effects

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Abstract

Courts and judges have become highly visible in the Asian political landscape as part of a global trend towards the judicialization of politics. Yet while understanding of what is driving this trend is growing, current models provide little insight into how actual judicial performance and behavior can be explained; nor is there agreement on how judicial behavior might affect governance. Drawing on an earlier typology of mine, I argue here that judicial behavior over time is an outcome of the interplay between institutional, ideational, and agency-specific variables. That is why the effects of judicial engagement on aspects of democratic governance are difficult to evaluate. However, the tentative evidence presented here suggests that the relationship is positive in countries where courts have worked to actively facilitate dialogue between different branches of government. This article thus seeks to advance the current debate on variances in judicialization and their effects both empirically and theoretically.

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Introduction

Courts and judges have become highly visible in Asian politics. The regular interventions of their Supreme Courts in the animated politics of the Philippines and India were long considered an exception in the region. No longer. In Korea, Taiwan, and Indonesia, constitutional courts have been crucial in diffusing political crisis and consolidating democratic practice, and in Pakistan the judiciary was critical to clearing the way back to democratic practice. The Malaysian High Court has been embroiled in several politically charged cases, and in Thailand since 2006 decisions of the Constitutional Court have drastically altered the political landscape. Even in more conservative Japan and semi-authoritarian Cambodia and China, there are occasional hints of judicial assertiveness, though those courts have so far avoided high-profile political cases.

The trend towards the ‘judicialization of politics’, which Hirschl describes as ‘the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies’, has been well-documented for the United States, Europe, and Latin America and is increasingly so, though more tentatively, for Asia. Yet, despite burgeoning empirical evidence of the trend across the globe, there is still considerable academic debate, not to mention practical concern, about its drivers and effects. The literature on drivers has generally fallen into two camps, either emphasizing judicialization from below via social demands for rights protection and limited government, or seeing judicialization from above resulting from strategic decisions by elites to secure their interests through countermajoritarian means. However, the models offered can be applied only with difficulty to an area as diverse as Asia. Comparative work is scarce, which may explain why current models

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offer little insight into how actual judicial performance and behaviour can be explained; nor is there agreement on how variances in judicial behaviour might affect governance.\(^4\)

The latter is of particular concern in Asia, where the effects of judicial empowerment are at best ambiguous. Some courts have actively intervened in politics to enhance governance, providing checks and balances on executive abuse, upholding the supremacy of law, and protecting the rights of citizens. Some, however, have actively subverted the rule of law and undermined mechanisms of accountability in favour of narrow interests; some have lent support to rule by law; others have been deliberately muted or highly restrained when engaging with core issues of political governance, provoking questions about their own autonomy.

Recognizing the dramatic variations in judicial performance and behavior in Asia, I set out to classify judicial behavior in areas of mega-politics, those matters of clear political significance that can define and divide whole polities. The effort produced a typology based on four ideal types—judicial restraint, judicial activism, politicization, and judicial muteness—that allows for a more nuanced picture of how judicialization is unfolding in Asia. From that point of departure, this article explores two foundational questions:

1. What drives judicial politics along different tracks? And what factors animate changes in judicial behavior over time?
2. How is the judicialization trend actually affecting governance? To what extent does it improve prospects for the rule of law and accountability to society? And in what circumstances does it attract political interference in the courts?

Both questions are of crucial empirical and theoretical importance but have yet to receive the attention they deserve in the literature.

My basic argument is that changing judicial behavior is best understood in terms of a triangular interplay between institutional, ideational, and agency variables. While each aspect is in itself important to inducing change, how the three flow together is what ultimately explains marked

differences in judicial patterns. As the cases will illustrate, how a given variation in the trend affects governance is difficult to evaluate, but it is clearly more positive where the role of the judiciary has been to facilitate rather than adjudicate constitutional debate and exchange between branches of government. This is particularly true in terms of electoral disputes, executive prerogatives, or questions of nationhood.

To advance the argument, I first survey the literature to identify basic concepts and debates, from which a basic typology can be extracted. Drawing on jurisprudential and related scholarship, I then turn to what may be driving a given judicial pattern over time, and its effects on governance. Finally, there is a brief discussion of the nexus between judicialization and governance in Asia and what it means for both theoretical debate and practical concerns about the rule of law.

A Typology of Judicial Politics

The idea of “judicialization of politics” has often suffered from conceptual stretching that encompasses different, though sometimes interrelated, processes. Deserving of thoughtful separation, for instance, are

- the abstract capture of social relations and popular culture by law due to the growing complexity of modern societies—perhaps better called ‘juridification’;
- the more concrete and much analyzed intrusion of the courts into public policy as part of ‘ordinary’ constitutional rights jurisprudence (positive rights, procedural justice) and the redrawing of boundaries between state organs (separation of powers, federalism); and
- the narrower though highly salient reliance on courts and judges to deal with ‘mega-politics’—core political controversies and deep moral dilemmas related to such areas of pure politics as executive branch prerogatives, electoral politics, and regime change.

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In essence, judicialization narrowly conceived refers to the way judges in exercising judicial review contribute to or at least influence public policy—the process by which courts and judges, especially constitutional or supreme courts, can come increasingly to dominate the making of public policy, which had previously been the prerogative of legislatures and executives. Understood more generally, though, judicialization is not limited to the expanded scope of ‘judge-made law’; it also encompasses the increased presence of judicial processes and court rulings in political and social life, for instance when social actors use the courts and the law to advance their own interests, political actors become more attuned to court actions, and state legitimacy is constructed increasingly in terms of the rule of law. If we combine these two notions, we can say that judicialization is generally marked by more deference to the courts, to the point that they can make major political decisions. When that happens, the courts have more influence on aspects of governance than their traditional role would allow.

So far, much current scholarship has focused on the sources of judicial empowerment. For instance, an early round of scholarship anchored the trend towards constitutional transformation and judicialization in macro-level processes of democratization and modernization; in a tendency, from the functionalist and neo-institutional point of view, to greater system efficiency; or in the search for solutions to systemic collective action problems. Others then expanded these perspectives to incorporate the global spread of rights consciousness and to legal structures

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7 Hirschl (n 6 above), pp.99-100.
8 See Sieder et al 2005; Tate and Vallinder (n 3 above)
that support mobilization by civil society; this approach is consistent with a ‘demand-side’ view of judicialization not just from below but even from abroad.\textsuperscript{12}

More recently, what is perhaps the most influential scholarship to date argues that empowerment of courts is part of a ‘supply-side’-driven process of judicialization from above that occurs when self-interested strategic actors have political reasons to empower judges. The reasons may be dysfunctional institutions;\textsuperscript{13} the wish to delegate authority to courts in order to shift responsibility\textsuperscript{14} and build legitimacy for contested policies;\textsuperscript{15} the personal motivations of judges;\textsuperscript{16} or (the most common attribution) the intent of elites to secure their interests through countermajoritarian means.\textsuperscript{17}

This is not the place to critically review all these theories. What matters is that no one seems to have considered the variations in actual judicial performance in different countries and their effect on governance. Not only has there been very little empirical work done, but too often rigid assumptions underpin the dominant theories of judicial empowerment and thus bias the scope of inquiry. So recently some scholars have urged greater contextualization, especially more attention to historical and ideational factors\textsuperscript{18} and others a more multidimensional and temporally dynamic approach.\textsuperscript{19}


The current debates certainly offer interesting avenues for both exploring judicial empowerment and explaining actual judicial behavior. Indeed, the literature seems to support a move towards a basic typology of judicial politics that has two dimensions:

- **de facto independence**, based on the insight that the judicialization process is influenced by the degree of court independence (institutional factors); the willingness of judges to intervene (behavioral); and support from political elites (structural); and
- **engagement in megapolitics**, based on the insight that judicial involvement may exist a continuum from minimal to extensive in areas of megapolitics.

With these two principal dimensions in mind, we can build a matrix of judicial pattern types, from judicial restraint and judicial muteness to judicial activism and politicization of the judiciary (Figure 1).

**Figure 1. Typology of Judicial Politics in Areas of Megapolitics**

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True, these patterns of judicial behavior may be slightly overdrawn. For instance, the difference between ‘restraint’ and ‘muteness’ largely relates to whether courts have the autonomy to withdraw from areas of megapolitics when they choose; likewise, where independence is low,
depending on the issues the pattern might easily flip between ‘politicization’ and ‘judicial muteness’ (or even ‘de-judicialization’).

Moreover, the relationship between the judicial system, law, and politics is often highly fluid, and the degree of judicial involvement may swing widely not only from country to country but within a country over time. Judicial engagement in megapolitics may be temporary, whether because exceptional events causing deadlock propel judges into the political fray or because political actors respond to judicial activism with institutional changes that curb judicial powers. However, it is also clear that as institutional practices become engrained, more stable patterns of judicial governance emerge that make it possible to more consistently characterize the behavior of a country’s courts.

The typology helps to bring greater analytical rigor to the study of judicialization and its effects on governance. Primarily, it allows for a more nuanced and temporally dynamic view of the phenomenon. For instance, for analytic purposes it helps to capture a distinct country pattern at a given point in time and also makes it possible to identify trajectories of judicial politics over time. As a result, the typology urges greater analytical attention to the conditions in which certain judicial patterns emerge and what drives change.

The typology may also trigger debate about how the judicial patterns it identifies might affect modes of governance, for instance in respect to the rule of law, democratic accountability, and the protection of rights. Hence, it allows us to formulate basic hypotheses and arguments and test them empirically across countries. That is of both theoretical and practical concern as Asian countries come to grips with a judicial repositioning and evaluate its impact on the quality of their own governance.

Patterns of Judicialization

To illustrate our typology let us turn to actual cases. I look primarily at the behavior of supreme or constitutional courts. Because these are the courts most likely to be engaged with megapolitics, they showcase nuances in the trend and variations in its effects.
Judicial Activism: Korea and Indonesia

The Korean and Indonesian Constitutional Courts illustrate the growth of judicial activism in direct support of democratic governance. Both were born out of democratic transitions: Korea’s Sixth Republic was established in 1987 and the Constitutional Court created in 1988; the Indonesian Constitutional Court was established in 2003 as part of sweeping post-Suharto amendments. Both have gradually moved beyond the quiescence envisioned to become active and respected national institutions.

Several cases illustrate how the two courts are increasingly involved in areas of mega-politics. For instance, since the 1990s the Korean Constitutional Court has in a string of high-profile decisions struck down legal provisions that required large registration fees for minority candidates or a higher deposit from independent than party-affiliated candidates and gave party-based candidates advantages over independents in campaigning and leafleting. It has also rectified disproportional representation for rural districts. Moreover, ruling that the constitutional guarantee of equality of opportunity and the right to run for or hold office is a core democratic freedom, the court has not only addressed electoral distortions and leveled the democratic playing field, it has also lent active support to a more representative and competitive democratic process.

Similarly, since 2004 the Indonesian Constitutional Court has several times intervened in the electoral process. Controversially, it allowed former members of the Communist Party (PKI, Partai Komunis Indonesia) to stand in legislative elections, on the grounds that the constitution

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23 National Assembly Members Act Case, 89 HonKa 6, 1 KCCR 199, 249 (Sep. 8, 1989).
24 National Assembly Members Act Case, 92 HonMa 37, 39, 4 KCCR 137 (Mar. 13, 1992).
25 Electoral District Disproportionality Case, 95 HonMa 224, 7-2 KCCR 760 (Dec. 17, 1995).
26 Ginsburg (n 18 above), pp. 226-246.
protects citizens from discrimination\footnote{“Rehabilitasi Untuk Anak-Cucu”, Gatra, February 27, 2004.}; it boldly found unconstitutional allocation of parliamentary seats according to party rankings, which cleared the way for a fully open party system\footnote{Constitutional Court Decision No. 011-017/2003 (The PKI Case).}; and in an emergency decision announced two days before the 2009 presidential ballot that every eligible Indonesian with a valid identity card could vote.\footnote{“Putusan MK: KTP dan Paspor Bisa Dipakai Untuk Nyontreng Pilpres”, Sinar Indonesia Baru, July 7, 2009.} Shortly thereafter, it overturned a verdict of the Supreme Court to restore the initial seat allocation formula against a decision of the election commission—the commission had raised concerns about the Supreme Court ruling as favoring large parties beyond their share of the popular vote. Thus it again lent support to a more competitive political process.\footnote{“Apalagi Yang Ditunggu KPU?”, Lampung Post, August 13, 2009.}

The Korean Constitutional Court even vetoed a government decision to move the capital.\footnote{Capital Relocation Case, 2004 Hun-Ma554.566 (October 21, 2004).} Later, when asked whether President Roh Moo-Hyun\footnote{Impeachment of the President Case, 16-1 KCCR 609, 2004Hun-Na1 (May 14, 2004).} had violated the law by what appeared to be campaigning for his own party during mid-term elections, the court did find several violations but rejected his removal as disproportionate – a very measured approach considering that by the time the ruling was released, Roh’s party had already won overwhelmingly.\footnote{Youngjae Lee, ‘Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective,’ American Journal of Comparative Law 53 (2005).} In taking on the case, the court maneuvered itself into becoming a final arbiter in charged political cases, often at the expense of other institutions, such as parliament: the trend continued in subsequent cases involving Roh and his successor, President Lee Myung-bak.\footnote{Ginsburg (n 22 above), p. 149.} Meanwhile the Indonesian court was demonstrating similar activism in strategic, and controversial, cases related to human rights and religion.\footnote{See for instance: the Bali Bomber case (No. 013/PUU-I/2003), or the anti-pornography cases.}

\textit{Politicization of the Judiciary: Thailand (2006-2010)}
The activist stance of the Thai Constitutional Court since 2006 offers a different judicialization trajectory. Rather than being driven by independent judicial assertiveness, Thai judicial activism in areas of mega-politics seems to reflect a general politicization of the judiciary.36

Perhaps the first manifestation was the Constitutional Court’s decision to annul the April 2006 general elections.37 The Thaksin government had called snap elections to counter allegations of its disloyalty to the monarchy, corruption, and conflicts of interest; the election proceeded despite an opposition boycott. The court’s decision to nullify the elections was remarkable in itself but even more remarkable for how it was handled: Unusually broad reasoning directly challenged the legal opinions of the Election Commission of Thailand (ECT), which many experts had considered valid, and there seemed to be unusual coordination: The Administrative Court had decided in April to cancel the rerun election of parliamentarians, the Constitutional Court annulled the general election, and the Criminal Court brought actions against the election commissioners. Many linked all this to a speech in which the monarch had urged the judiciary to find a solution to the political impasse.38

Then in May 2007 the military-appointed Constitutional Court ordered the dissolution of the Thai Rak Thai (TRT) party and barred 111 of its members from office for five years.39 This was the first case heard by this bench, many of whose members had been overtly critical of the Thaksin government. The decision came just days after a speech in which the king had urged judges to continue working to resolve the political crisis (“I have the answer in my heart, but have no right to say it”). In finding TRT and allies Pattana Chart and Chart Thai guilty of election violations, the tribunal effectively decapitated Thailand’s largest and most popular political party, which had won landslide victories in 2001 and 2005. Not just the popular Thaksin but now also virtually anyone else who had risen in his party or cabinet was ineligible for office. At the same time the military-favored Democrat Party was unanimously acquitted of all charges, despite evidence of similar illicit activities. Later the court decided to seize almost US$1.7

37 Constitutional Court Decision (No. 9/2549 (2006).
39 Constitutional Tribunal Decision (No. 3-5/2550 (2007).
billion in Thaksin family assets; the unusually laborious verdict showed the judges at great pains to downplay concerns about retroactivity. Since some justices also had unusually harsh words for the former Prime Minister, there were grounds for the concern that the tribunal had bent legal rules to achieve an outcome desired by the junta.

Two Constitutional Court cases in late 2008 demonstrate a continuance of the trend: The first found Prime Minister Samak Sundaravej guilty of a conflict of interest for hosting a popular cooking show on TV; the second dissolved the People’s Power Party (PPP), the TRT’s political successor. Both were heard after the PPP won in junta-organized general elections in December 2007 and during an intensifying political stand-off between anti- and pro-Thaksin camps. Samak had to resign for what many considered a minor abuse of power, and successor Prime Minister Somchai had to resign after PPP executive member Yongyut Tiyapairat was found guilty of vote buying. Both cases, which cleared the path for a Democrat-led government, are notable for creative constitutional interpretations and breaches of procedural due process that looked suspiciously like the un-rule of law.

Since then, both the Supreme Administrative Court and the Supreme Court have released rulings that directly interfere with government policy. As highlighted by the very favorable treatment of the Democrat Party, whose dissolution case in 2010 was thrown out on a technicality, the involvement of the Thai court in areas of megapolitics has less to do with asserting independence than with the politicization of the court by traditional elites.

**Judicial Restraint: Japan and Malaysia**

The Japanese and Malaysian Supreme Courts illustrate yet another trajectory, one in which courts, although nominally independent, decide not to engage with mega-politics and exhibit a general pattern of restraint.

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40 Constitutional Court Decision (No. 12-13/2551 (2008).
41 Constitutional Court Decision ( No. 20/2551(2008).
42 See, for instance, the Supreme Administrative Court’s temporary injunction against 76 major investment projects worth Bt400bn (US$12 billion) around the Map Ta Phut industrial estate (Court Order 592/2552(2009).
The Japanese Supreme Court is recognized as deeply conservative.\textsuperscript{45} Since its founding in 1947 the court has struck down only eight statutes on constitutional grounds (meanwhile, e.g., the German Constitutional Court struck down 600), and hardly any of those rulings could be considered megapolitical,\textsuperscript{46} except, perhaps, the 1976 decision to reject a legislative apportionment scheme that gave the votes of rural voters five times more weight than those of urban voters.\textsuperscript{47} However, although some saw that decision as a ‘high point of over fifty years of judicial review’, the court did not order any remedy.\textsuperscript{48} In perhaps the most politically charged case—challenges to military activities and security arrangements under Article 9 of the postwar constitution, which prohibits Japan from maintaining armed forces or other ‘war potential’—the court has steadfastly refused to rule, citing the political question doctrine.\textsuperscript{49}

In Malaysia a string of Supreme Court decisions in the two decades after independence demonstrates the dynamics of self-imposed restraint. In one typical decision,\textsuperscript{50} then-Chief Justice Raja Azlan Shah stated:

\begin{quote}
Whether the impugned Act is ‘harsh and unjust’ is a question of policy to be debated and decided by parliament, and therefore not meet for judicial determination. [...] Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution [...] Those who find fault with the wisdom or expediency of the impugned Act [...] normally must address themselves to the legislature and not the courts; they have their remedy at the ballot box.\textsuperscript{51}
\end{quote}

\textsuperscript{46} The Court has struck down a law punishing patricide more severely than other forms of homicide (Aizawa v. Japan, 27KEISHU 265 (Sup. Ct., April 1973); a law restricting pharmacies from operating in close physical proximity of one another (Sumiyoshi K.K. v. Governor, Hiroshima-ken, 29 MINSHU 572 (Sup. Ct. April, 1975); a rule limiting the liability of the postal service for the loss of registered mail (Shichifuku Sangyo K.K. v. Japan, 56 MINSHU 1439 (Sup. Ct., Sept. 11, 2002); a law restricting the co-owners of forest land from subdividing their property (Hiragushi v. Hiragushi, 41 MINSHU 408 (Sup. Ct., Sept. 22, 1987); and a provision that distinguished for purposes of eligibility between illegitimate children of Japanese fathers who acknowledged paternity before birth and those whose fathers acknowledged paternity only later (Jane Doe v. Japan, 62 MINSHU 1367 (Sup. Ct., June 4, 2008)).
\textsuperscript{47} Kurokawa v. Chiba Prefecture Election Commission, 30 Minshu 223 (Sup. Ct. G.B., April 1976)
\textsuperscript{48} Law (n 46 above), pp. 1547-48
Reflecting widespread sentiment among judges, and with the political realm giving the courts little reason to intervene, the Malaysian judiciary, particularly the Supreme Court, adopted a stance of ‘pragmatic conservatism’. Whether that still holds may be questionable, however. The courts have intervened in constitutional crises in 1983, 1988, and 1992 (in 1988, in fact, Prime Minister Mahatir removed the Chief Justice and five of his colleagues, with lasting effects), and growing government instrumentalization is further suggested by a number of high-profile cases against opposition figures (e.g., Badawi). However, recent calls by the Chief Justice for restraint also suggest that the idea of self-imposed restraint still shapes judicial behavior.

Thus both Japan and Malaysia (into the 1980s) demonstrate that autonomy and independence do not necessarily promote judicial activism. In fact, high courts may deliberately decide to exercise restraint in certain cases—a practice that has become engrained in Japan. Yet whether that strategy is sustainable also depends (as recent developments in Malaysia suggest) on structural factors beyond the court.

**Judicial Muteness: Singapore**

Finally, the Singapore Supreme Court illustrates a trajectory marked by limited judicial independence and limited engagement in megapolitics. Operating within the soft authoritarian rule of the People’s Action Party (PAP), the court draws attention not only to the limits of judicial autonomy where the executive dominates but also to the complexities of judicial behavior in relation to areas of governance.

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52 See: Mederka University Berhad v. Government of Malaysia [1981] 2 MLJ 356, in which judge Abdoolcader J argued: “I am not concerned with the political […] I am moved by no considerations other than determining the issues involved purely and strictly within the confines of the Federal Constitution and the law, abjuring any concomitant political or emotional offshoots springing like Athena from the head of Zeus in its wake […] I should add that the unconstitutionality and illegality of administrative action and not the unwisdom of legislation or executive discretion is the exclusive and narrow concern of judicial review.” See also Tommy Thomas, ‘The Role of the Judiciary,’ in Aliran Reflections on the Malaysian Constitution (Penang: Aliran 1987), p. 98.


Since its founding in 1957 the Singapore Supreme Court has exercised its judicial review powers cautiously\(^5\); it rarely addresses substantive constitutional or political issues. In fact, the five-year reviews of legal developments published by the Singapore Academy of Law have never discussed constitutional and administrative law, as the Chief Justice himself has pointed out.\(^6\) While this judicial muteness in areas of megapolitics partly reflects a lack of open contestation in a tightly controlled political system, it also illustrates government efforts to subtly control the judiciary, especially the Supreme Court, through such means as removal of external review of Singapore’s courts (appeals to the Privy Council ceased in 1994); curtailment of sentencing prerogatives; executive discretion in appointing Supreme Court judges (many of them linked to the PAP inner circle); rotation of judges through legal service positions; lack of tenure for many judges; and the extension of Supreme Court contracts beyond legal retirement age. These are in addition to corporatist control over institutions of higher legal education and such professional organizations as the Singapore Law Society—both gateways to the bench. Given the intimate ties of judges to the ruling class, it is not surprising that courts do not address core political issues.

Not that the judiciary is without relevance in Singapore. The government has been careful to sustain the image of a professional and efficient judiciary, and Supreme Court commercial decisions have won the confidence of the international business community. But politically sensitive cases—even short of megapolitics—often reveal very different dynamics. For instance, in defamation and contempt of court cases against prominent members of the opposition, the courts have deviated significantly from long-held principles of English law\(^7\); they have resorted to contempt of court punishments, and the damages awarded are drastically different in political and nonpolitical cases.\(^8\) In fact, blatant used of courts for political purposes may have made it difficult to fill the Supreme Court bench; some judges accept appointment only on condition that

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\(^5\) Between 1957-2010, there have been seventy nine cases of judicial review, of which 27.8 percent went in favor of the applicants. See Chan Sek Keong, ‘Judicial Review - from Angst to Empathy,’ Singapore Academy of Law Journal 22 (2010), p 474

\(^6\) Chan Sek Keong (n 58), p. 473.

\(^7\) See for instance a comment by ICJ observer, Canadian Judge Paul Bentley, in the Jeyaratnam trial: ‘The logic escapes me! (Judge) Rajendran indicated that he was adopting the reasoning of the English House of Lords in Rubber Improvements Ltd. v Daily Telegraph Ltd […] as the correct interpretation of the law of defamation […] On this reasoning, Jeyaratnam’s words to the crowd could not be defamatory. Yet the conclusion of Judge Rajendran runs in clear opposition to the rationale in the ‘Lewis’ case.’, cited in Worthington (n 57), p.491

\(^8\) See Worthington (n 55), p. 126
they not hear political cases.\textsuperscript{59} Lacking the bureaucratic autonomy of the Japanese court, and with some judges actively supporting the corporatist and communal ideology that seeks to keep political conflict out of court \textsuperscript{60} (occasional cases against politicians notwithstanding), Singapore’s Supreme Court shows little inclination to engage with megapolitical issues.

Clearly, then, the judicialization trend in Asia is far from monodirectional. This prompts questions, such as: What is driving the trend in different directions? Why have some courts moved from one quadrant of our typology to another? And how is the direction of the trend, as well as judicial pattern more broadly, affecting areas of governance?

\textbf{Change and the Effects of Judicial Politics in Asia}

A cursory look at the Asian landscape suggests that where the judiciary goes is largely driven by the type of regime: courts seem more activist in established, vibrant democracies (e.g., South Korea, Indonesia, India, Taiwan); judges are far less assertive in semi-authoritarian and authoritarian settings (e.g., China, Cambodia, Malaysia).

This is not surprising. Political liberalization and democratization often reposition the judiciary, as when constitutions are rewritten to incorporate judicial review, more explicit rights and liberties, and safeguards for judicial independence.\textsuperscript{61} In the Philippines, for instance, judicial empowerment has been critical to the post-Marcos 1987 constitution and efforts to leave behind the authoritarian past and prevent executive abuse.\textsuperscript{62} In Korea, Indonesia, and Thailand, the new

\textsuperscript{59} Worthington (n 55), p. 516.
\textsuperscript{60} In a speech to law students, Chief Justice Chan Sek Keong advocated a ‘green light approach,’ viewing courts not as “first line of defence against administrative abuses of power: instead, control can and should come internally from Parliament and the Executive itself…” thus leaving the role of courts to one of support in ‘articulating clear rules and principles by which government may abide one and conform to the rule of law’; cited from Chan Sek Keong (n 58), pp. 480-481.
architecture brought in centralized judicial review and new courts envisioned as guardians of the constitutional order and final arbiters of political conflict. 63

Yet the relationship between regime type and judicialization is not necessarily causal. While judicial empowerment may often spring from liberalizing reforms, the reforms are hardly sufficient to explain how courts actually behave. In fact courts have often been cautious about wading into political controversies, doing so only after other political institutions have gradually matured. Elsewhere even specialized courts have not fully accepted their new role; for instance, the activities of the Cambodian Constitutional Council were stifled not only by the political environment but also by the lack of judicial capacity and will. 64 Perhaps most instructive, the Japanese Supreme Court reminds us that despite considerable democratic maturity and judicial autonomy, courts may choose to avoid political controversies. 65

So how can we determine why certain judicial patterns emerge and what changes them over time?

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Understanding Change: Institutions, Ideas, and Agency

Judicial patterns, it seems to me, are best understood as the outcomes of a triangular interplay between institutional, ideational, and agency variables. While each aspect is important in itself for animating changes, it is at the confluence of all three that a new judicial pattern emerges.

Institutional variables naturally have considerable influence on patterns of judicialization. For instance, courts need both basic powers and at least some structural independence if they are to influence the polity. Several implications follow from this:

1. Macro-institutional choices related to the court system must be taken into account. For instance, setting up specialized courts, such as constitutional courts, with exclusive powers of judicial review can stimulate judicialization of politics as new review powers open up new areas of engagement, often in highly contentious areas, for traditionally conservative institutions. As a consequence, these courts emerge as focal points for political and civil society actors. Ultimately, and willingly or not, they are drawn into highly contested areas of political conflict.

2. Equally important are micro-institutional rules related to appointment procedures, composition of the bench, judicial terms, and the autonomy of court budgets. Such rules are not only critical to the structural independence of courts and their ability ‘to make decisions according to the law and not based on external or internal factors’, but they also provide powerful incentives to and constraints on the behavior of both individual judges and courts as institutions. For instance, differences in how judges are appointed to

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66 I am broadly referring here to the well-established literature on centralized vs. dispersed judicial review; see good overview, Chien-Liang Lee, "A Comparative Study of Judicial Review Procedure Types—The Option of Constitutional Procedure System in Reform of the Constitutional Review of Taiwan," National Taiwan University Law Review 5, no. 1 (2010).


the constitutional courts in Indonesia, Thailand, and Korea influence political interference in the appointment process and the extent to the activism of those courts.\textsuperscript{69}

3. Similarly, constitutional drafting decisions have often led the judiciary to engage directly, for the first time, in such contentious political areas as electoral disputes, executive prerogatives, and even questions of nationhood. Clearly, constitutional decisions are a major factor in both whether politics becomes judicialized and whether courts become politicized.

Yet the effect of institutional rules need not be political assertiveness by courts. In Japan, the unusual restraint of an otherwise highly independent judiciary is attributed in part to the tight control of the General Secretariat of the Supreme Court over the selection, appointment, and career trajectories of judges.\textsuperscript{70} Similarly, institutional changes to the appointment and tenure system in Malaysia after the first constitutional crisis both muted the top court and eroded judicial independence and professionalism all the way down.\textsuperscript{71} Such constraints are perhaps most visible in China, where institutional and political factors have greatly restricted the activities of the Chinese Supreme People’s Court.\textsuperscript{72}

That court also serves as a reminder that the entire institutional setting needs to be taken into consideration. For instance, the more institutional power is diffused, the more likely it is that courts will be drawn into the political fray. As illustration, in the presidential systems in the region (Korea, Indonesia, the Philippines) courts have often been called upon to arbitrate political stalemates between branches of government and even surrounding the presidency


\textsuperscript{70} O’Brien and Ohkoshi (n 66 above); Law (n 66)


There is less recourse to the courts in parliamentary systems (Thailand, India, Malaysia, Japan) due to traditions of parliamentary sovereignty and single-party dominance (e.g., Congress in India; the LDP in Japan; the UMNO in Malaysia; the CPP in China), though this has begun to change along with the underlying systems, as Thailand demonstrates.\textsuperscript{74}

**Ideas and values** have twofold importance in the extent to which courts engage in politics. For one thing, the ideational context is critical to understanding the origins of judicial empowerment. As Hilbink argues\textsuperscript{75}, historical and ideational factors, such as shared experiences, beliefs, identities, and ideologies, ‘shape the way that political actors perceive their interests, formulate strategies, and justify their decisions, and are thus crucial to explaining when, why and how institutional designers choose to empower courts.’ This is vividly illustrated throughout the region: Consider the liberal ideas that culminated in the 1997 Thai constitution; the effects of the constitutional crisis provoked by the Wahid impeachment trial in Indonesia; and previous experiences of authoritarian rule in Korea and the Philippines. In short, ideas, home-grown or borrowed, shape the preferences of actors and are critical for explaining the institutional foundations of judicial politics.\textsuperscript{76}

Equally important, and perhaps less understood, is the fact that ideas and values are equally critical in that they shape the self-understanding of the judiciary and thus shape patterns of judicial behavior. Ideational legacies (often carried over from colonial times); training and access to legal networks abroad; and the realities of legal pluralism all help shape judicial outlook and mindset in Asia. For instance, it has been suggested that the unusual quiescence of the Japanese Supreme Court in political matters can be explained by the integration of 19\textsuperscript{th} century German theory into Japanese constitutional law.\textsuperscript{77} Similarly, it has been argued that the ‘three supreme doctrine’, among other ideational foundations, may allow the Chinese Supreme People’s Court

\textsuperscript{73} Francis Fukuyama, Björn Dressel, and Boo-Seung Chang, "Facing the Perils of Presidentialism?," *Journal of Democracy* 16, no. 2 (2005); Jiunn-rong Yeh, "Presidential politics and the judicial facilitation of dialogue between political actors in new Asian democracies: Comparing the South Korean and Taiwanese experiences," *International Journal of Constitutional Law* 8, no. 4 (2010).
\textsuperscript{74} Dressel (n 39 above).
\textsuperscript{75} Hilbink (n 19 above), p. 782.
some internal autonomy but also ties it closely to the stability paradigm of the CCP, which assigns it an apolitical role of guidance and interpretation.  

In theoretical analysis it may be possible to consider the roles of ideas and institutions independently, but in practice they are harder to separate. For instance, in the Philippines U.S. legacies not only inform the training of judges but are also a powerful factor in the self-identification of the Supreme Court as activist. Similarly, Malaysian courts have been greatly influenced by judicial developments in the Commonwealth, especially since many Malaysian judges were trained overseas (though not so much now as the indigenization of the judicial system is reinforced). Conversely, where there have been sharp ideational breaks from the past (e.g., Cambodia) and where new courts were formed, judicial behavior may take time to demonstrate a pattern; the lapse of time and institutional uncertainty, however, can also offer court leaders themselves considerable leeway to shape judicial behavior, particular where the leadership is stable and personalities are strong. This was vividly demonstrated in the Indonesian Constitutional Court as led by Chief Justice Mahfud—an example that contrasts nicely with that of the Thai Constitutional Court.

In short, though ideational factors—imbued and carried on through institutions or within the background of the cohort of judges—are often difficult to evaluate without a deep understanding of the context, they are important for explaining why courts refrain from exercising powers, or at the other extreme make particularly expansive interpretations.

Finally, agency dynamics should be considered. This is not the place to revisit the ‘agency’ vs. ‘structure’ debate, nor to fully deal with dominant strategic rational models. What I mean
here by ‘agency’ are aspects of ‘judicial leadership’, including the extent to which judges are embedded within elite dynamics. Indeed, bold judicial interventions in politics (or the lack thereof) often are rooted in general state-society relations, especially intra-elite dynamics. As some studies in the region vividly illustrate, when political settlements unravel or elite and social cleavages emerge, courts are often pulled into the political fray, sometimes as independent arbiters, sometimes, where independence is compromised, as an arm of ruling elites. In fact, judicialization is often facilitated, if not driven directly, by power struggles within society.

Consider the Malaysian Federal Court and the leadership contest within the UMNO ruling coalition in the late 1980s. Or the impeachment proceedings against former President Estrada in the Philippines early in 2000. Both situations, which drew the judiciary into the political fray, reflected widening intra-elite gulfs. There have also been blatant attempts to use the judiciary for political purposes against opposition candidates, most notably in Malaysia and Cambodia, though also in Thailand, where the judiciary has steadily been instrumentalized by traditional monarchical networks in their efforts to consolidate power. 84 Similar concerns have emerged in the Philippines, where several decisions of the Supreme Court against former president Gloria Macapagal Arroyo, accused of vote rigging and corruption, have been questioned in light of a number of ‘midnight’ appointments she made before leaving office. 85

But judges are not simply pawns in a high-level power play. Often closely tied ideologically and socially to ruling political elites, judges may fully support regime interests and the underlying ‘elite compact’, as shown in Singapore or in the early post-independence period in Malaysia. 86 Yet at times they may also pursue interests of their own, particularly when allied with outside actors. This was vividly illustrated by the Chaudhry court in Pakistan 87 and in the active

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championing by the Supreme Court of India of civil society causes in areas of human and socio-economic rights.  

Thus judicial actors themselves often behave strategically when building and maintaining legitimacy becomes critical. For instance, while it may be fair to say that elite consensus in favor of judicial independence provides space for a range of judicial activities, courts as the weakest branch of government often choose their direction and interventions strategically to enhance their standing among the public and with other branches of government, particularly the executive.

This is not always easy. In fact as the region rapidly modernizes, new areas of political contestation and intra-elite conflict have emerged, often renewing struggles over both the content and the control of law. These struggles are not always exerted only by formal actors. Here it is useful to keep in mind the informal dynamics that coexist with the formal in Asia. For the judiciary they may take the form of penetration through patrimonial structures or influence exerted by traditional power centers, such as military or royal networks, which combined with growing international exposure and rising domestic demand for rule-based governance have prompted judicial actors to test boundaries and champion new causes, in sometimes unexpected ways.

The often-used term ‘strategic behavior” deserves particularly careful analysis in the Asian context. Though assumptions about the rational and strategic behavior of judicial actors are often useful for theoretical purposes, they are not always helpful in empirical analysis when they are deeply embedded in the historical institutional and ideational context.

When thinking about how the complex interplay of institutional, ideational and agency aspects may shape the trajectory of judicial politics and explain change over time, the case of Malaysia is particularly instructive89. The initial post-independence ideational pattern of judicial restraint was gradually transformed into judicial activism in the 1980s through leadership and value

89 See H. P. Lee, Constitutional Conflicts in Contemporary Malaysia (Kuala Lumpur ; New York: Oxford University Press, 1995); Khoo Boo Teik (n 72 above).
changes. That process was stopped in its tracks under Mahathir (1981–1998) by institutional changes, leaving today’s judiciary struggling for footing and issuing decisions that seem to oscillate between restraint and tentative efforts at activism. Similar stories can be told from elsewhere in the region, highlighting the usefulness of the framework suggested here.90

Evaluating Outcomes

Finally, how do we to evaluate the effects of the judicialization trend in Asia? This is not easy. Among other things, it raises the issue of benchmarks against which these developments can be assessed, especially given the diversity of political settings in Asia. There is also the (almost inevitable) risk of a normative bias, like that so vividly illustrated in the current debate on the influence of judicial actors in politics.91

In order to make a tentative evaluation, let us scrutinize the nexus between judicial politics and governance. Governance describes how authority is exercised in a polity through a country’s economic, political, and social institutions—the processes by which decisions are made and implemented.92 Judicialization refers to the process through which rulings and modes of court reasoning come to influence governance decisions. Both processes intersect in the arena of judicial politics, which opens up possibilities for analysis of how an identified judicial pattern affects such aspects of governance as stability, accountability, and rule of law.

Many scholars have concerned themselves with distinct aspects of the trend, such as politicization of the judiciary in favor of narrow interests or outright cooptation of courts, which mutes judicial actors. Political conflict and instability can in fact be exacerbated when justice is seen to be partial and the political system as not inclusive. Consider recent political decisions of the Thai Constitutional Court and the Malaysian High Court that were widely perceived as biased; they not only undermined the legitimacy of the court system but also widened

90 See for more cases, Dressel (n 73 above)
92 Robert R. Kaufman and Aart Kray, "Governance Indicators: Where are we, where should we be going?," World Bank Research Observer 23, no. 1 (2008).
destabilizing political rifts in society.\textsuperscript{93} Even in authoritarian settings, failure to deliver impartial judgments in political cases has raised issues for regime legitimacy, both internally and externally. This might explain the ‘judicial hybridity’ now appearing in China, Cambodia, and Singapore. In Singapore, for instance, courts deciding commercial cases are far more widely respected than those deciding political cases.

Instances of growing judicial activism or self-imposed restraint are more difficult to evaluate. For instance, while some scholars have suggested that growing judicial assertiveness has been critical to deepening the democratic process, heightening the accountability of public officials, and making the state more responsive to individual and socioeconomic rights—particularly in transitional democracies like South Korea, Taiwan, and Indonesia—others have been wary of growing judicial involvement in policy areas and the bold expansion of judicial powers by judges themselves (e.g., the ‘basic structure’ doctrine in India or recourse to a ‘customary constitution’ in Korea). This is partly because judges lack expertise in and capacity for public policy making and partly because there is a danger that judicial powers might expand at the expense of other institutional actors, particularly those legitimated by popular mandate. But this is not to say that judicial restraint is always the answer; it carries the risk that contested megapolitical issues remain unresolved or are badly addressed, which reinforces uncertainty and ultimately erodes legitimacy.

What seems to emerge from the differences in Asia is the pragmatic insight that the effects of judicialization on governance depend on both the strategic behavior of the courts and their constitutional dialogue with other branches of government. Rather than conceptualizing judicial empowerment as a zero-sum game, what matters is whether meaningful dialogue on critical issues is fostered and engages all institutions, to the ultimate transformation of political conflict into constitutional politics. This is particular true for megapolitical issues, which by nature are likely to be deeply divisive.

So far, courts in the region have differed on how to facilitate political dialogue and create sufficient political space for full debate. The South Korean Constitutional Court has done this

\textsuperscript{93} Dressel (n 39 above)
largely by dismissing cases, while the Taiwanese Constitutional Court has often explicitly demanded that political actors enter into dialogue.\textsuperscript{94} For instance, the Korean court sat on the local-election postponement case for more than two years waiting for political consensus to be reached—and then dismissed it;\textsuperscript{95} other decisions have seized on the withdrawal of litigants to allow for legislative solutions;\textsuperscript{96} or outright dismissal on the basis that parliament should decide;\textsuperscript{97} or political aspects prevent appropriate judicial review.\textsuperscript{98} However, in Taiwan several decisions directly urged political dialogue, laying out possible solutions and asking the executive and legislature to fulfill their procedural duties and reach consensus,\textsuperscript{99} or urging the national government to enter into negotiations with local governments.\textsuperscript{100} On the same path are the Indian Supreme Court, the Indonesian Constitutional Court, and the Philippines Supreme Court, all of which have sought to explicitly engage other branches of government.\textsuperscript{101}

As these different strategies illustrate, courts must carefully choose their battles and the scope of their interventions; judicial actors are painfully aware that, as the weakest branch of government, they largely derive their political capital from their own legitimacy. However, as regimes mature, early popular court decisions tend to be replaced by decisions in complex cases that may prove divisive—but that increasingly invite political actors to have recourse to the courts rather than risk unpopularity themselves. Because courts in transitional settings are limited in how they affect social change and resolve intense political disputes, especially where institutional arrangements are still fragile, it may well be that courts through procedural solutions and facilitation of constitutional dialogue help deepen governance dynamics in Asia.

\textsuperscript{94}This section draws heavily on Yeh (n 74 above), pp. 945-948
\textsuperscript{95}Constitutional Court of Republic of Korea, Twenty Years, p. 260
\textsuperscript{96}See the May 18 Indictment Non-institution of Prosecution case, (n 98), pp. 264-267
\textsuperscript{97}See Acting Prime Minister Case and the Rice Dispute Case, (n 98), pp. 264-267 and pp. 335-337
\textsuperscript{98}See Forces to Iraq Case, (n 98), pp. 288-290
\textsuperscript{99}J.Y. Interpretation No. 520 (2001).
\textsuperscript{100}J.Y. Interpretation No. 550 (2001); see also Jiunn-Rong Yeh, "Democracy -Driven Transformation to Regulatory State: The Case of Taiwan," National Taiwan University Law Review 3, no. 2 (2008), p. 53.
\textsuperscript{101}See Mietzner (n 22 above); Pangalangan (n 63 above); Shylashri Shankar, Scaling Justice: India's Supreme Court, Anti-Terror Laws, and Social Rights (Oxford University Press, 2009).
Conclusion

Presenting a typology of judicial politics as a starting point, this paper has used variations within the judicialization trend in a region where the role of courts is growing as a starting point to explore intensively how judicial power is asserted and transformed and the ends to which it has been applied. The paper seeks not only to give deeper context to the judicialization trend but also to broaden the arena for much-needed comparative research into how distinct judicialization patterns emerge and change over time.

Drawing comparative insights from countries throughout the region, the basic argument advanced here is that changing patterns of judicial behavior evolve from the triangular interplay of institutional, ideational, and agency-specific variables, which naturally vary by country. My research suggests that the effects of an assertive independent judiciary on areas of governance (though carefully qualified, given each country context) is generally positive where courts have sought to actively facilitate constitutional dialogue and widen space for debate; that role is generally compromised in countries where courts are politicized or co-opted.

It seems clear that current theoretical models of judicialization do not translate well to Asia, a region that is not only host to remarkable regime diversity but that still struggles with authoritarian enclaves, legacies of executive dominance, and an often technocratic understanding of the judicial process and the rule of law. It is my hope that by providing an initial frame of reference and drawing attention to variations and effects, this paper will stimulate further research into the judicialization of politics in Asia – something that is not only long overdue but, that, as recent developments illuminate, is ever more necessary.