Tom Ginsburg

JUDICIAL REVIEW *in New Democracies*

CONSTITUTIONAL COURTS *in* ASIAN CASES

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Constitutional Courts in Asian Cases

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Judicial Review in New Democracies

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In recent decades, new democracies around the world have adopted constitutional courts to oversee the operation of democratic politics. Where does judicial power come from, how does it develop in the early stages of democratic liberalization, and what political conditions support its expansion? This book answers these questions through an examination of three constitutional courts in Asia: Taiwan, Korea, and Mongolia. In a region where law has traditionally been viewed as a tool of authoritarian rulers, constitutional courts in these three societies are becoming a real constraint on government. In contrast with conventional culturalist accounts, this book argues that the design and function of constitutional review are largely a function of politics and interests. Judicial review – the power of judges to rule an act of a legislature or executive unconstitutional – is a solution to the problem of uncertainty in constitutional design. By providing "insurance" to prospective electoral losers, judicial review can facilitate democracy.

Professor Tom Ginsburg is Assistant Professor of Law and Political Science and Director of the Program on Asian Law, Politics, and Society at the University of Illinois. He holds B.A., J.D., and Ph.D. degrees from the University of California, Berkeley. He has worked extensively in Asia on legal reform and democracy programs, spent a year lecturing at Kyushu University, Japan, and worked at the Iran-U.S. Claims Tribunal in The Hague. He has authored numerous articles on comparative law and international arbitration.

To Amber

"... in the mysterious East as in the pellucid West, constitutions, however detailed, are no better than the institutions they are written into."

– Clifford Geertz, *Local Knowledge* (1983), p. 204

"Every judge who judges truly becomes, so to speak, an associate of the almighty in the creation of his World."

– Talmud Shabbat 10a

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Notes on Usage

Chinese and Korean names appear throughout the text and notes with family names first. For consistency, the anglicization of Korean names has been made uniform, with personal names hyphenated and the second syllable in lower case. I apologize should this deviate from preferred usage. Japanese names appear mainly in the references and are presented in western format with personal name first.

Judicial Review in New Democracies

Constitutional Courts in Asian Cases

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Introduction

The Decline and Fall of Parliamentary Sovereignty

THE DECLINE OF PARLIAMENTARY SOVEREIGNTY

The idea of the sovereignty of Parliament was long seen as the core of democratic practice. The superior position of the popularly elected legislature and its corollary of majority rule have been central principles for democratic revolutionaries since the notion was appended to the unwritten English constitution.[1] At that time, the threat to liberty was monarchical power, and the subjugation of monarchical power to popular control was the primary goal. The resulting doctrine was that Parliament had "the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[2]

In the continental tradition, the intellectual underpinning of parliamentary sovereignty was provided by the Rousseauian concept of the general will. The people were supreme, and their general will as expressed through their republican representatives could not be challenged. This theory, combined with the regressive position of the judicial *parlements* in the French Revolution, led to a long tradition of distrust of judges in

[1] The original focus in England during the Glorious Revolution was on control of the crown rather than the rule of the people per se, because the democratic franchise was quite restricted. Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999). Rakove distinguishes the supremacy of Parliament from the idea that representative bodies were primarily designed to be law-making bodies. Jack Rakove, "The Origins of Judicial Review: A Plea for New Contexts, 49 *Stan. L. Rev.* 1031, 1052 (1997).

[2] Albert V. Dicey, *The Law of the Constitution* 3–4 (8th ed., 1915).

France.[3] The *government du juges* replaced the crown as the primary threat to popular will in French political thought.[4]

It was natural that the early proponents of democracy supported parliamentary sovereignty. They saw threats to liberty from the traditional sources: the *ancien régime*, the monarchy, and the church. Once these formidable obstacles to popular power had been overcome, theorists could hardly justify limitations on the people's will, the sole legitimate source of power. As democratic practice spread, however, new threats emerged. In particular, Europe's experience under democratically elected fascist regimes in World War II led many new democracies to recognize a new, internal threat to the *demos*. No political institution, even a democratically legitimate one, ought to be able to suppress basic liberties. Postwar constitutional drafting efforts focused on two concerns: first, the enunciation of basic rights to delimit a zone of autonomy for individuals, which the state should not be allowed to abridge; and second, the establishment of special constitutional courts to safeguard and protect these rights. These courts were seen as protecting democracy from its own excesses and were adopted precisely because they could be countermajoritarian, able to protect the *substantive* values of democracy from procedurally legitimate elected bodies.

The ideal of limited government, or constitutionalism, is in conflict with the idea of parliamentary sovereignty.[5] This tension is particularly apparent where constitutionalism is safeguarded through judicial review. One governmental body, unelected by the people, tells an elected body that its will is incompatible with fundamental aspirations of the people. This is at the root of the "countermajoritarian difficulty," which has been

[3] Jeremy Jennings, "From 'Imperial State to l'Etat de Droit': Benjamin Constant, Blandine Kriegel and the Reform of the French Constitution," in *Constitutionalism in Transformation: European and Theoretical Perspectives* 76, 78 (Richard Bellamy and Dario Castiglione, eds., 1996). The *parlements* had engaged in a kind of judicial review themselves. Mauro Cappelletti, *Judicial Review in the Contemporary World* 33–34 (1971). The activation of the *Conseil Constitutionnel* in the Fifth Republic, especially because it unilaterally read the preamble of the constitution as being legally binding in 1971, has radically changed French practice in this regard. See Alec Stone, *The Birth of Judicial Politics in France* (1992).

[4] This distrust of a judicial role in governance, beyond applying legislation, led the French to create a special system of administrative courts in 1872. This system of special courts applying a separate law for the government led Dicey to argue that the French *droit administratif* was less protective of individual liberties than the English institutional manifestation of the rule of law. Dicey, *supra* note 2, 220–21, 266.

[5] Paul W. Kahn, *The Reign of Law:* Marbury v. Madison *and the Construction of America* 215 (1997).

the central concern of normative scholarship on judicial review for the past three decades.[6]

Although the postwar constitutional drafting choices in Europe dealt parliamentary sovereignty a blow, the idea retained force in terms of political practice. More often than not, the idea was used by undemocratic regimes. Marxist theory was naturally compatible with parliamentary sovereignty and incompatible with notions of constitutional, limited government. Similarly, new nations in Africa and Asia reacting to colonialism often dressed their regimes in the clothes of popular sovereignty, though oligarchy or autocracy were more often the result.

Today, in the wake of a global "wave" of democratization, parliamentary sovereignty is a waning idea, battered by the legacy of its affiliation with illiberalism. Judicial review has expanded beyond its homeland in the United States and has made strong inroads in those systems where it was previously alleged to be anathema. From France to South Africa to Israel, parliamentary sovereignty has faded away. We are in the midst of a "global expansion of judicial power," and the most visible and important power of judges is that of judicial review.[7]

Even in Britain, the homeland of parliamentary sovereignty and the birthplace of constitutional government, there have been significant incursions into parliamentary rule. There have been two chief mechanisms, one international and the other domestic. The first mechanism is the integration of Britain into the Council of Europe and the European Union (EU), which has meant that supranational law courts are now regularly reviewing British legislation for compatibility with international obligations. The domestic subordination of legislation of the British Parliament to European law was established when the House of Lords disapplied a parliamentary statute in response to the European Court of Justice's (ECJ) *Factortame* decision of 1991.[8] More recently, the incorporation of

[6] The term, and the terrain of the debate, were laid out by Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of American Politics* (2d ed., 1986).

[7] Neal Tate and Thorsten Vallinder, eds., *The Global Expansion of Judicial Power* (1995).

[8] *R. v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2)* [1991] 1 A.C. 603. The case concerned parliamentary legislation aimed at preventing primarily Spanish-owned but British-registered ships from operating in particular quota areas. This violated various EU law principles of nondiscrimination. The House of Lords asked the ECJ whether it could issue a preliminary injunction against an act of Parliament and was told that it had an obligation to do so where legislation violated EU treaty rights. For a detailed discussion of the case, see Josef Drexl, "Was Sir Francis Drake a Dutchman? – British Supremacy of Parliament after Factortame," 41 *Am. J. Comp. L.* 551 (1993).

the European Convention of Human Rights into United Kingdom domestic law by the Human Rights Act 1998 has led to greater involvement of courts in considering the "constitutionality" of parliamentary statutes (and administrative actions) under the guise of examining compatibility with Convention requirements.[9] Although as a matter of domestic law the Human Rights Act attempts to preserve parliamentary sovereignty in that it allows an explicit parliamentary derogation from the convention, it has not been wholly successful. The Parliament now tends to scrutinize legislation for conformity with the convention, and this is a source of constraint; furthermore, even explicit parliamentary derogrations may still lead to a finding by the European Court of Human Rights that Britain has violated its obligations. Thus, it cannot really be said that the Parliament is truly sovereign in Dicey's sense of being unchecked by other bodies.

The second mechanism is the growth of domestic judicial review as shown by an expanding body of administrative law. According to many observers, United Kingdom (UK) courts are exhibiting growing activism in checking the government, especially since the 1980s.[10] This administrative law jurisprudence has grown in recent years. The practice of international courts reviewing British legislation no doubt played a role in undermining the primary objection to domestic judicial review. The British objection to domestic courts exercising judicial review was *not* that judges were incapable of it or that the rule of law was a secondary goal. Indeed, it was the assertion that government was subject to ordinary law applied by ordinary judges that was at the heart of Dicey's celebration of the English constitution. Rather, the traditional objection to judicial review was that the people acting through Parliament possess complete sovereignty. This argument has now lost force. If the will of the Queen in Parliament is already being constrained by a group of European law professors sitting in Strasbourg, then the objection to constraint by British judges is much less potent.

[9] See, for example, Ian Leigh, "Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg," *Public Law* 265–87 (2002), and David Feldman, "Parliamentary Scrutiny of Legislation and Human Rights," *Public Law* 323–48 (2002).

[10] See, for example, Jerold L. Waltman, "Judicial Activism in England," in *Judicial Activism in Comparative Perspective* 33–52 (Kenneth Holland, ed., 1991); Susan Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (1997). For an older doctrinal exegesis of judicial review in UK courts, see C.T. Emery and B. Smythe, *Judicial Review* (1986).

Even if one believes that Parliament is still sovereign in the United Kingdom, the adaptability of the always-anomalous British unwritten constitution as a model is clearly declining. In Britain itself, academics widely agree that there is a crisis of constitutional legitimacy.[11] Furthermore, several countries that were historically recipients of the British model have recently departed from it. In the Caribbean, several former British colonies have joined together to establish a new supranational court of final appeal, the Caribbean Court of Justice, discontinuing the practice of appeal to the Privy Council in London. Other former colonies have adopted constitutional acts or amendments entrenching new rights in the constitution.[12] In some countries, such as New Zealand and Israel, these acts are amendable by ordinary majorities and not entrenched as in other polities. Nevertheless, they maintain great normative power as constitutional legislation and politically speaking are more difficult to amend than legislation concerning routine matters of governance, even if not institutionally protected. There has even been a step in this direction in Saudi Arabia, although the Saudi government continues to take the formal position that it has neither a constitution nor legislation other than the law of Islam.[13]

The major bastions resistant to judicial involvement in constitutional adjudication have lowered their resistance in recent years. The concept of expanded judicial power has even crept surreptitiously into the international system, where there has been recent consideration as to whether there is a sort of inherent power of judicial review in international law.[14] The issue under consideration concerns whether the United Nations Security Council's findings that it is acting to defend peace and security under Chapter VII of the United Nations Charter (UN Charter) are reviewable by the International Court of Justice. There is no explicit

[11] For cites, see Tony Prosser, "Understanding the British Constitution," in *Constitutionalism in Transformation: European and Theoretical Perspective* 61, 68 n.33 (Richard Bellamy and Dario Castiglione, eds., 1996).

[12] For example, the Israeli Basic Laws of 1992, the Canadian Bill of Rights Act (1960), the Canadian Charter of Rights and Freedoms (1982), and the New Zealand Bill of Rights Act (1992).

[13] In 1992, the government adopted a Basic System of Rules that defines the structure of government and establishes a new mechanism for succession. See Rashed Aba-Namay, "The Recent Constitutional Reforms in Saudi Arabia," 42 *Int'l & Comp. L.Q.* 295 (1993).

[14] Dapo Akande, "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?," 46 *Int'l & Comp. L.Q.* 309 (1997); see also Jose Alvarez, "Judging the Security Council," 90 *Am. J. Int'l L.* 1 (1996).

provision for judicial review in the UN Charter, and a Belgian proposal to establish it during the drafting of the UN Charter was rejected. The International Court of Justice has, however, considered the issue in *dicta*. The court has thus far carefully avoided making an express finding that the security council has acted outside of the scope of its powers, but it refused to explicitly deny that the court has the power to review the security council's actions.[15]

The United Nations, of course, is not a democratic system, nor one wherein majority rule has ever been unconstrained, by virtue of the institutional entrenchment of particular founding nations through the veto power on the Security Council. It is nevertheless interesting that some of the same questions that confront new democracies are being asked at the international level as well. Is there any action by supreme organs in a legal system that are *ultra vires*? If so, who has the power to decide whether an action crosses the line? And if the answer is a judicial body, who guards the guardians of legality?

As the "third wave" of democracy has proceeded around the globe, it has been accompanied by a general expansion in the power of judges in both established and new democracies. Virtually every post-Soviet constitution has at least a paper provision for a constitutional court with the power of judicial review.[16] New constitutional courts have been established in many new democracies. The following table (Table 1.1) demonstrates the spread in new democracies of constitutional courts, that is, bodies with the explicit power to overrule legislative acts as being in violation of the constitution. Countries listed in the table are those characterized by the Freedom House survey as democracies in 2000 that had not been so as of 1986, plus other well-known "third wave" democracies.

Table 1.1 shows that although there are institutional variations, providing for a system of constitutional review is now a norm among democratic constitution drafters. Indeed, that such a norm exists is also evidenced by the fact that new constitutions in countries that still fall fairly short

[15] See "Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US; Libya v. UK)," 3, 114 *I.C.J.* (1992) (Provisional Measures). The issue was also raised in "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia/Herzegovina v. Yugoslavia (Serbia and Montenegro))," 3 *I.C.J.* (1996) (Request for Provisional Measures).

[16] See, for example, Rett R. Ludwikowski, "Constitution Making in the Countries of Former Soviet Dominance: Current Developments," 23 *Ga. J. Int'l & Comp. L.* 155 (1993), and Rett R. Ludwikowski, *Constitution Making in the Countries of Former Soviet Dominance* (1996).