

## Law, Democracy and Development in East Asia

Reaction paper for the lecture of 2023/05/25

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While reading the assigned literature I was constantly doubting whether the authors are idealizing the efficiency of authoritarian regimes or whether my views are just too Eurocentric to fully grasp the concepts and advantages they describe. Maybe because for the last 4 years I've been focusing my studies on Human Rights, sentences like Tom Ginsburg's "this chapter is treating courts as simply one alternative mechanism for governance" or Weitseng Chen's "the relationship between economic development and authoritarianism equipped with legal and institutional innovations (i.e. legality and constitutionalism) [...] may outperform liberal democracies" surprise me, maybe even shock me.

While I do understand that Asian Hybrid Regimes (AHR) might have been the reason for impressive economic development in the region over the last few decades, I just can't stop thinking about the unmentioned sacrifices parts of the population had to make within these authoritarian systems for this to happen. Chen does mention things like land disputes in Taiwan, Korea and Japan, but while reading his article it almost seems like for him those were unfortunate events necessary for economic development. The fact that these events led to problems that partly don't have a solution until now is only vaguely mentioned. Same goes for the example of what Chen calls "administrative guidance regimes", that enable "developmental states to interact and guide the private sector". Chen does mention a few problems that arose from these kind of interventionist market regimes (e.g. the underdevelopment of labor laws and consumer protection laws and the existence of family-affiliated conglomerates e.g. the Chaebol-problem in South Korea), doesn't however seem to think that these are important problems corrupting today's democratic systems in East Asia. Very similarly Ginsburg considers that the "perfect internalization of the preferences of the principal eliminates the need for monitoring and enforcement", stating that in Leninism this indoctrination was paired with externally imposed terror to keep agents in line, and concluding that this mechanism is much more cost efficient than administrative court procedures. Chen adds to this by giving examples concerning the role of the judiciary in "controlling" the executive, as he almost casually mentions Taiwan's government cutting the Supreme Court's budget for retaliation over a controversial decision or South Korea's president not re-electing certain judges that opposed his view in a court decision. From my — admittedly maybe over-westernized — perspective, these are not funny anecdotes about judicial independence but shocking flaws of the legal system, that touch the core principle of separation of power and therefore the essence of a constitutional order establishing rule of law. I therefore see Chen and Ginsburg as part of whom Chaihark Hahm's article refers to, when he states that "separation of powers was understood more often as a mean for making sure the judges were subordinated to the legislature, and less as an ideal for guaranteeing judicial independence", not recognizing the judiciary as a co-equal branch of the government. I do however not agree with him saying that constitutional courts "do not fit the conventional separation of power schemes", as I think a conventional court that is based on clear and strict constitutional rules does not provide space for political misuse. Controversies such as the one surrounding Jeon Hyo-sook's nomination as the president of Korea's constitutional court can

only happen when the constitutional context is not strong enough to create a fair and transparent court. I therefore think that only in countries where separation of power is weak in general, there are constitutional courts that don't respect the separation of power.