

Law, Democracy and Development in East Asia
Weitseng Chen, National University of Singapore Faculty of Law

Commentary by: Ronja Hesse

The three articles offer meaningful insights into how constitutions function and play significant political roles in various forms of government, including authoritarian, hybrid, and democratic regimes.

In Chen's 2017 work and Ginsburg's 2008 study, they delve into constitutionalism within non-democratic settings. They illustrate how, on one hand, constitutions can play a crucial role in bolstering authoritarian or non-liberal systems, aiding these governments in maintaining political stability. On the other hand, they also show how this same mechanism carries the risk of potentially undermining the very same system (Chen 2017). Ginsburg further investigates how public law, especially administrative law, can be utilized as a political tool for control of public agents. He delves into the potential hazards of various control methods, pointing out how specific circumstances may incentivize a specific government towards certain regulatory instruments (Ginsburg 2008).

Concerning Chen's elaboration on hybrid regimes, the discussion around their constitutionalism was particularly enlightening. The author highlights how introducing democratic mechanisms like constitutionalism into an authoritarian or hybrid system can impact these systems. Constitutionalism in hybrid systems, like those in Singapore or formerly Taiwan and South Korea, is often initiated as a somewhat obscured version primarily focused on promoting economic growth. It is convincing that that this can lead to a judicial system prioritizing performance over protecting citizen rights and establishing performance as a primary indicator of legitimacy.

Connecting this with our class discussion and other readings on the assumed link between economic growth and democratization, the text provides many powerful arguments disputing such a connection. Simultaneously, it recognizes the "inherent tensions between authoritarianism and constitutionalism" (Chen 2017: 12) — a conflict that authoritarian and hybrid systems often must manage to contain if they incorporate legal frameworks within their governance. Constitutionalism in hybrid systems must, therefore, be seen as a double-edged sword — potentially reinforcing or destabilizing non-democratic regimes. In connection with our class discussion the case-specific understanding of these effects and the consequences of the integration of constitutionalism in a certain country becomes challenging due to the high relevance of the specific context (history, (political) culture, international influences etc.) as well as the unpredictability of possible contingencies – all of which I find very convincing.

In Ginsburg's analysis, I was especially interested by his portrayal of public litigation in authoritarian contexts as a means of utilizing citizen participation to oversee public administration. This mechanism how I understand it only promotes adherence within an agent-principal framework, but, somewhat implicitly in Ginsburg's work, enhances legitimacy. This latter point becomes more evident when Ginsburg's insights are read in conjunction with those of Chen, under the premise that at least similar dynamics operate within authoritarian and hybrid regimes.

The construction of legitimacy is particularly salient as it fosters a perception of genuine or effective participation, which in reality is confined to prescribed areas that do not challenge the central government's legitimacy. This is achieved by "sacrificing" less sacrosanct elements of

the public administration, such as lower-ranking officials or regional institutions, which are typically targeted by this type of litigation. It would be worthwhile to investigate the extent and manner in which the PRCs central government leverages these litigations. This could potentially involve scapegoating certain administrative elements while portraying itself as the guarantor of citizens' rights. Relating this to the argument of efficiency it can also be a "cheap" and potentially "sustainable" way for governments to maintain their unfree social order as the open repression of political opponents can be very costly and cause an increase of support for opposition amongst primarily not active citizens thereby damaging the reputation of the non-free government.

Moreover, there is a considerable parallelism regarding the potential peril that the deployment of constitutionalism or legalism may pose to authoritarian or hybrid governments. It is important to acknowledge, as I presume the two authors would do, significant distinctions between these regime types regarding the risks described. Specifically, the potential utilization of litigation by political opposition poses a greater threat in nations where such opposition can form. Contrarily, in China, individuals or civil society organizations largely undertake this form of litigation, often without jeopardizing the Chinese Communist Party or the State Council due to the aforementioned reasons.

The last text by Hahm explores the Constitutional Court in democratic South Korea (Hahm 2012) and in that way must be read again the backdrop of the decade old discussion about the role of central constitutional courts within the different branches of government. It is interesting in contrast to the other two texts to see a case where the constitutional court out of itself influences the politics and moving between the legislative and the judicative which is not unfamiliar for me coming from Germany which also has a rather strong constitutional court whose decisions regularly influence the legislative activity. I found particularly notable how the specific set-up and history of a court can influence its public perception.

References

Chen, Weitseng (OUP, forthcoming 2023). Asian Hybrid Regime, in David Law et al. (eds), *The Oxford Handbook of Constitutional Law in Asia*

Hahm, Chaihark (2012). Beyond "Law vs. Politics" in Constitutional Adjudication: Lessons from South Korea, 10 (1) *Int J Constitutional Law* 6

Ginsburg, Tom (2008). Administrative Law and the Judicial Control of Agents in Authoritarian Regimes, in Ginsburg and Mustafa (eds), *Rule by Law*